Supreme Court, U. S.
FILED
DEC 16 1977
MICHAEL RODAK, JR., CLERK

No. 77-870

In the

Supreme Court of the United States

OCTOBER TERM, 1977

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,

vs.

CITY OF PALESTINE, TEXAS, ANDERSON COUNTY, TEXAS, Et Al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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December 19, 1977

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Missouri Pacific Railroad Company, respectfully requests that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 19, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 559 F.2d 408, appears in the Appendix hereto at App. 4 The Report and Order of the Interstate Commerce Commission, dated May 4, 1976, are reported at 348 I.C.C. 414.

Pertinent portions of the Commission's Report and Order and excerpts from the Initial Decision of the Administrative Law Judge appear in the Appendix at App. 25.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was issued and entered on September 19, 1977. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Where the Interstate Commerce Commission had determined in a merger proceeding under Section 5 of the Interstate Commerce Act that state law restraints are contrary to the public interest because they would frustrate the realization of economies and efficiencies of the merged operation, may the Court of Appeals preclude the removal of those restraints on the ground that the formal merger itself could be effectuated notwithstanding such restraints?

STATUTES INVOLVED

Pertinent portions of Section 5 of the Interstate Commerce Act, as amended (49 U.S.C. §5), are set forth in the Appendix at App. 1*.

STATEMENT OF THE CASE

On November 1, 1974, Missouri Pacific Railroad Company (MoPac) and its principal subsidiaries, the Texas

* Section 403(a) of the Railroad Revitalization and Regulatory Reform Act of 1976 (Pub. L. 94-210, 90 Stat. 63) redesignated former paragraph (11) of Section 5 as paragraph (12). The Commission's decision and the Fifth Circuit opinion herein refer to this paragraph as (11), and, consequently, that designation is used in this Petition.

and Pacific Railway Company (T & P) and Chicago & Eastern Illinois Railroad Company (C & EI), filed a joint application with the Interstate Commerce Commission to merge the properties and franchises of T & P and C & EI with and into MoPac.

The joint application specifically requested the Commission to include terms and conditions in its order of approval that would nullify certain laws of the State of Texas and an agreement arising thereunder between MoPac and the City of Palestine, Texas, which required MoPac to maintain forever 4.5% of all its employees in certain job classifications in Palestine.* The application stated that complying with the requirements of Texas law and the Palestine Agreement "will be an intolerable burden on the resulting system . . . [and] would be costly and wasteful and unduly interfere with the flexibility which the System needs to meet changes in operating, traffic and economic conditions as they arise, and to effect the benefits contemplated by the proposed merger."

The City of Palestine and Anderson County, Texas, intervened before the Commission and presented evidence in opposition to the request that the Palestine Agreement be nullified. The Initial Decision of the Administrative Law Judge concluded, however, that the condition requested by the joint applicants was fully justified and should be granted.

* The history of the Palestine Agreement and the Texas statutes on which it was based is set forth in detail in the opinion below. (App. 5-9). As the court of appeals noted, the Palestine Agreement has remained in effect as a burden on MoPac solely as a result of Texas statutes requiring railroads operating in Texas to maintain general offices and other facilities at locations where predecessor roads agreed to locate them.

The Administrative Law Judge specifically found that the Palestine Agreement would substantially defeat realization of the economies and efficiencies that would otherwise flow from consolidation and, consequently, that the Agreement's requirements "have no necessary relation to economy and efficiency in operation or service, are contrary to the public interest and the National Transportation policy, and would hinder Applicants' unified operation and service and thereby impose an undue burden upon the proposed unified operation and upon interstate commerce."* (App. 54). The Administrative Law Judge concluded that the Commission had the authority to grant the relief requested as part of its "exclusive and plenary" authority under §5(2)(b) of the Act to approve mergers upon "such terms and conditions and such modifications as it shall find to be just and reasonable" and "consistent with the public interest." (App. 43-48).

On May 4, 1976, the Commission affirmed the Initial Decision and approved the proposed merger with the condition, among others, nullifying the Palestine Agreement:

> "We agree with the discussion, findings, and conclusions of the Administrative Law Judge with respect to the Palestine Agreement and its effect on the proposed merger and on interstate commerce. The Commission has on numerous occasions relieved carriers from the same Texas statutes and similar contractual obligations in proceedings under section 5." (348 I.C.C. at 430; App. 31).

The City of Palestine, Texas, and Anderson County, Texas, petitioned for review of the Commission's order pursuant to 28 U.S.C. § 2321(a). On September 19, 1977, the court of appeals set aside the Order insofar as it prescribed as a condition of the approval of the Missouri Pacific Merger that the roads be relieved of the Palestine Agreement.

Significantly, the court of appeals accepted the Commission's finding that the Agreement was a burden on the consolidated system and interstate commerce:

> "No doubt the merged MoPac system would operate more efficiently and free of 'burdens on interstate commerce' without the strictures of the Palestine Agreement." (App. 14).

The court of appeals nevertheless concluded that §5(11) of the Act limited the Commission's authority in this instance:

> "Section 5(11)'s description of the freedom enjoyed by carriers in an approved merger recognizes that the carrier's immunity from state law extends only '*insofar as may be necessary to enable them to carry into effect* the transaction so approved or provided for. . . .' 49 U.S.C. §5(11) (1970) (emphasis supplied). These words express a practical limitation on the power of the ICC. The ICC's pursuit of the public interest focuses on its approval of railroad mergers, consolidations, acquisitions, and other section 5(2) transactions. Actions taken by the ICC

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* The Palestine Agreement was found to interfere with the effectuation of the economies and efficiencies of the merger in two respects: (1) the Agreement would prevent MoPac from consolidating its Freight Claims Section of the Accounting Department in St. Louis, Missouri, with a resulting savings of $240,238 per year and a more efficient handling of the public's freight claims; and (2) the Agreement would prevent MoPac from building new shop facilities elsewhere in Texas, where the mechanical department employees would be better and more efficiently utilized, to replace the congested, poorly tooled, and obsolete facility at Palestine, which cannot be rebuilt there because of geographical and topological factors. (App. 52-54)

> in connection with those transactions but not necessary to them exceed the scope of its authority. In section 5(11) Congress clearly expresses a sensitivity to state law: the ICC's approval may overturn state law only where 'necessary to carry into effect' the transaction." (App. 12-13).

Expanding on this view of §5(11), the court held that, "even when it serves the general public interest," the ICC has the power to "shoulder aside" state restraints only when such action was "necessary to the effectuation of the merger;" that is, when state laws "stood in the way of the approved transaction." (App. 13, 15).

Thus, the court of appeals concluded that the Commission is powerless under Section 5 to nullify state law restraints even when those restraints frustrate the economies and efficiencies to be realized from a carrier consolidation, impose an undue burden on interestate commerce, and are contrary to the public interest. The court of appeals held that the Commission may attach conditions to its merger approval removing such restraints only when they absolutely prohibit the formal merger as such.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS CONTRARY TO DECISIONS OF THIS COURT CONSTRUING THE INTERSTATE COMMERCE COMMISSION'S AUTHORITY TO NULLIFY STATE LAW RESTRAINTS IN APPROVING A CARRIER CONSOLIDATION.

The Court of Appeals for the Fifth Circuit reached its erroneous interpretation that §5(11) of the Interstate Commerce Act (49 U.S.C. §5(11)) imposes a limitation on the authority of the Interstate Commerce Commission to nullify state law restraints by taking a portion of that section out of context. The court of appeals focused exclusively on that part of §5(11) that provides that carrier immunity from state law restraints resulting from a Commission merger approval order extends only:

> "insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for. . . ." (App. 13).

This excerpt, which was read out of context to limit Commission state law nullification powers to those instances where the state law stands in the way of the formal merger, is only a portion of §5(11). The entire provision in question reads:

> "they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for *in accordance with the terms and conditions, if any, imposed by the Commission.* . . ." (Emphasis added).

The underscored phrase demonstrates that Congress did not intend §5(11) to be a limitation on Commission authority but merely a description of the scope of the im-

munity conferred by law as a result of a Commission order. State and other laws are nullified insofar as they may interfere with the carrying out of the consolidation in accordance with any terms and conditions imposed by the Commission. The Commission's power to impose such terms and conditions is not governed by §5(11) but only by §5(2)(b), which requires that the terms and conditions be "just and reasonable" and that the merger as approved "will be consistent with the public interest." (App. 2). It was under this grant of authority from §5(2)(b) that the Commission based its action in this case.

The court of appeals' erroneous holding that §5(11) prevents the Interstate Commerce Commission from imposing merger conditions nullifying state law restraints where the restraints would frustrate the economies and efficiencies to be realized by the merger but would not absolutely prevent the formal merger itself is also flatly inconsistent with this Court's decisions in *Texas* v. *United States*, 292 U.S. 522 (1934); *Seaboard Air Line R.R. Co.* v. *Daniel*, 333 U.S. 118 (1948); and *Schwabacher* v. *United States*, 334 U.S. 182 (1948). None of these decisions interpreted §5(11) as imposing a limitation on the Commission's authority to prescribe consolidation conditions. Each of these decisions clearly affirmed the Commission's authority to nullify state law restraints that were not absolute impediments to the proposed merger but instead frustrated potential economies and efficiencies.

In *Texas* v. *United States*, this Court upheld the Commission's power to approve terms of a lease that permitted the lessee road to abandon or remove from the State of Texas the general offices, shops, and other facilities of the lessor despite the contrary provisions of the

same Texas statutes underlying the Palestine Agreement. As this Court noted, the removal or abandonment of these facilities would result in an annual savings to the lessee of $81,000. (292 U.S. at 527). To this extent, therefore, the Texas statutes burdened the transaction, but they would not have prevented it. That is, the lease could have been entered into without also moving the offices and shops in violation of the Texas statutes. Nevertheless, this Court held that the Commission had the power to remove such restraints under Section 5 of the Act and its statutory mandate to further the public interest by promoting the development of economic and efficient transportation systems:

> "Transportation Act, 1920, introduced into the federal legislation a new railroad policy, seeking to insure an adequate transportation service. To attain that end, new rights, new obligations, new machinery, were created. [Citations omitted]. It is a primary aim of that policy to secure the avoidance of waste. That avoidance, as well as the maintenance of service, is viewed as a direct concern of the public. [Citations omitted]. The authority given to the Commission to authorize consolidations, purchases, leases, operating contracts, and acquisition of control, was given in aid of that policy. [Citation omitted.] *The criterion to be applied by the Commission* in the exercise of its authority to approve such transactions — a criterion reaffirmed by the amendments of Emergency Railroad Transportation Act, 1933 — *is that of the controlling public interest.* And that term as used in the statute is not a mere general reference to public welfare, but, as shown by the context and purpose of the Act, 'has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities.' [Citation omitted.]" (292 U.S. at 530-531; emphasis added).

Because the lease could have been effectuated without the savings that would have resulted from moving the facilities, this Court clearly held that the Commission's nullification power was not limited to state restraints that prohibited proposed transactions but also included those that only imposed financial burdens on those consolidations:

> "The fact that burdensome expenditures may be required by state regulations is not a barrier to their removal by dominant federal authority in the protection of interstate commerce. As we said in *Colorado* v. *United States*, 271 U.S. 153, 163: 'Prejudice to interstate commerce may be effected in many ways. One way is by excessive expenditures from the common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce.' Even explicit charter provisions must yield to the paramount regulatory power of the Congress. *New York* v. *United States*, 257 U.S. 591, 601. Obligations assumed by the corporation under its charter of providing intrastate service are subordinate to the performance by it of its federal duty, also assumed, 'efficiently to render transportation services in interstate commerce.'" (292 U.S. at 531).

As this Court held, the Commission has authority to nullify restraints of state law where such action "has direct relation to economy and efficiency in interstate operations and to the achievement of the purpose which the Congress had in view in its grant of authority." (292 U.S. at 532).*

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* The court of appeals herein acknowledged that the Texas statutes at issue in *Texas* v. *United States* merely "require[d] that the lessor forego consolidation with the offices of the lessee as the price of leasing a Texas-based railroad." (App. 14). But the statutes did not stand (Continued)

In *Seaboard Air Line R.R. Co.* v. *Daniel*, 333 U.S. 118 (1948), this Court reaffirmed the Commission's authority to nullify burdensome state law restraints. The Commission had found that Seaboard, a Virginia corporation, would have been subject to "substantial delay and needless expense" in complying with South Carolina statutes that burdened its acquisition of a South Carolina railroad and that such compliance "would not be consistent with the public interest." (333 U.S. at 121).

This Court upheld the Commission's decision nullifying these statutes, even though compliance therewith would not have prevented the acquisition.** This Court noted that, "Congress has long made the maintenance and development of an economical and efficient railroad system a matter of primary national concern. Its legislation must be read with this purpose in mind." (333 U.S. at 124-125).

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* (Continued)
in the way of the acquisition by the lessee of the lessor's facilities, the standard articulated by the court below as the *sine qua non* of the Commission's nullification power. The "price" imposed by the burdensome state laws in *Texas* v. *United States* is identical to that imposed by the Palestine Agreement: MoPac must forego the economies and efficiencies of consolidating facilities outside of Palestine with the consequent loss of substantial savings.

** The statement of the court below, in attempting to distinguish this Court's *Daniel* decision, that the South Carolina constitution and statutes "would have negated" the proposed acquisition in that case (App. 14), is incorrect. As this Court noted in *Daniel*, a non-South Carolina corporation could organize a South Carolina subsidiary and then consolidate that corporation with itself, an expensive and burdensome route but not a prohibited one. (333 U.S. at 120).

It is also significant that the *Daniel* decision involved Section 5 as amended by the Transportation Act of 1940, subsequent to the decision in *Texas* v. *United States*. This Court viewed the 1940 amendments as broadening the Commission's powers to deal with burdensome state restraints and held that the only limitation on Commission authority was the requirement in §5(2)(b) that it act in the "public interest":

> "Congress has given additional proof of its purpose to grant adequate power to the Commission to override state laws which may interfere with efficient and economical railroad operation. By §5(11) of the Interstate Commerce Act, as amended by the Transportation Act of 1940 . . . , Congress granted the Commission 'exclusive and plenary' authority in refusing or approving railroad consolidations, mergers, acquisitions, etc. The breadth of this grant of power can be understood only by reference to §5(2)(b) which authorizes the Commission to condition its approval upon 'such terms and conditions and such modifications as it shall find to be just and reasonable.' All of this power can be exercised in accordance with what the Commission may find to be 'consistent with the public interest.'" (333 U.S. at 125).

This Court concluded that the Commission had the authority to nullify not only "state laws which bar [carriers] from operating in the state," but also those which "impose conditions upon such operation." (333 U.S. at 126).

The breadth of the Commission's authority to nullify burdensome state law restraints was clearly stated by this Court in *Schwabacher* v. *United States*, 334 U.S. 182 (1948). This Court held that the Commission's power to impose conditions in approving a carrier consolidation is subject only to three considerations:

> "First, a finding that it 'will be consistent with the public interest.' (§5(2)(b).) Second, a finding that, subject to any modification made by the Commission, it is 'just and reasonable.' (§5(2)(b).) Third, assent of a 'majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote.' (§5(11).) When these conditions have been complied with, the Commission-approved transaction goes into effect without need for invoking any approval under state authority, and the parties are relieved of 'restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction.' (§5(11).)" (334 U.S. at 194-195).

This Court's holding is clearly contrary to the holding of the court below that the Commission is limited by §5(11) and may nullify state law restraints only where the restraints would stand in the way of or absolutely prohibit a proposed consolidation.*

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* The facts in *Schwabacher* further belie any such limitation. Minority shareholders who objected to a merger claimed that they had rights under a railroad's charter and state law to a certain level of compensation for their shares. This Court held that the Commission had the obligation to determine the amounts to be received by these dissenters and that such a Commission determination would have the effect of nullifying any contractual or state law restraints even though the Commission had found that the additional amounts requested were of such small magnitude that the road was amply able to bear "any probable expenditure of cash that it might be required to make in connection with the merger.

(Continued)

The decision of the court below, drastically limiting the Commission's authority under Section 5 of the Act, is thus manifestly inconsistent and in conflict with the decisions of this Court. Review by this Court is urgently needed to set aside this clearly erroneous restriction on the Commission's authority.

II. THE DECISION BELOW SIGNIFICANTLY IMPEDES THE DEVELOPMENT OF ECONOMIC AND EFFICIENT RAIL SYSTEMS, CONTRARY TO THE NATIONAL TRANSPORTATION POLICY ESTABLISHED BY CONGRESS.

Review should be granted not only because the decision below is manifestly inconsistent with decisions of this Court but also because the limitation imposed on the power of the Commission is of great importance to the administration of the railroad consolidation provisions of the Interstate Commerce Act. It is the Congressional policy and purpose, reaffirmed as recently as 1976, to encourage railroad consolidations and provide the Commission with all necessary authority to foster the development of efficient and economical rail systems through consolidations and mergers.

The decision of the court of appeals would frustrate Congressional policy by permitting state and local interests to burden severely the development of efficient interstate rail networks by enacting protective laws and

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* (Continued)
Accordingly, it appears that consummation of the merger will not involve a burden of excessive expenditure." (334 U.S. at 189). The contractual and state law claims clearly did not stand in the way of or absolutely prevent the proposed consolidation, as the decision of the court below would require.

ordinances that, while not expressly prohibiting the consolidation of railroads within their jurisdictions, impose costly and uneconomic conditions that are directly contrary to the public interest. If the erroneous construction of Section 5 of the Act by the court below is not corrected, the Commission will be powerless to deal with these parochial restraints and to achieve the goal of economical and efficient rail service mandated by Congress and recognized by this Court in *Texas, Daniel,* and *Schwabacher, supra.*

Beginning with the enactment of the Transportation Act of 1920 (Act of February 28, 1920, c. 91, 41 Stat. 474), Congress has continually manifested its purpose to promote rail mergers and consolidations. The Act empowered the Commission for the first time to approve proposed consolidations found to be in the public interest. Commission-approved mergers were expressly relieved from restraints imposed by restrictive state laws. As this Court recognized, the 1920 Act was designed to assure adequacy of transportation service. *New York Central Securities Corp.* v. *United States,* 287 U.S. 12, 25 (1932). Congress had determined that the public interest is served by "economy and efficiency in operation." (*Id.,* at 23). This Court most recently emphasized this objective of the 1920 Act in the Burlington Northern merger case, *United States* v. *ICC,* 396 U.S. 491, 508-509 (1970):

> "The 1920 statute as a whole also embodied concern for economy and efficiency in rail operations. . . . The policy of the 1920 Act has been consistently interpreted in this way."

Thus, this Court has held that the Commission's authority to approve mergers and consolidations must "be

given liberal construction in aid of the purposes Congress had in mind." *Escanaba & Lake Superior R.R. Co.* v. *United States,* 303 U.S. 315, 320 (1938). *See also United States* v. *Lowden,* 308 U.S. 225, 230 (1939); *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 81 (1944); *Schwabacher* v. *United States,* 334 U.S. 182, 191 (1948).

The Transportation Act of 1940 (Act of September 18, 1940, c. 722, 54 Stat. 899) reaffirmed and broadened the Commission's authority to approve rail mergers that would lead to a more economic and efficient transportation system. The primacy of this goal was emphasized by the Congressional statement of National Transportation Policy adopted therein:

> "It is hereby declared to be the national transportation policy of the Congress . . . to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers. . . . All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of power." (49 U.S.C., preceding §1).

Congress clearly expressed its purpose in the 1940 Act "to facilitate merger and consolidation in the national transportation system." *County of Marin* v. *United States,* 356 U.S. 412, 416 (1958). *See also* H.R. Rep. No. 2016, 76th Cong., 3d Sess. 61 (1940). Section 5 of the Act was amended to give the Commission "exclusive and plenary" authority to approve proposed mergers and to attach conditions found to be in the public interest. (§5(11), §5(2)(b)). This Court recognized that this enactment was "additional proof of [Congress'] purpose to grant adequate power to the Commission to override state laws which may interfere with efficient and economical railroad operation."

Seaboard Air Line R.R. Co. v. *Daniel,* 333 U.S. 118, 125 (1948).*

The Congressional purpose to remove impediments to consolidations and mergers that will promote the economical and efficient transportation system called for in the National Transportation Policy has been most recently evidenced in the passage of the Railroad Revitalization and Regulatory Reform Act of 1976 (Pub. L. 94-210, 90 Stat. 31). Title IV amended §5(2) and (3) of the Act to provide for expedited merger procedures "to encourage mergers, consolidations and joint use of facilities that tend to rationalize and improve the Nation's rail system." S. Rep. No. 94-499, 94th Cong., 2d Sess. 20 (1975).

Thus, Congress has repeatedly emphasized that the development of efficient, economical rail systems through consolidation and merger is in the national interest. "[T]he congressional directive for a limited number of railroad systems has not been changed. The only change has been in the means of achieving that goal." *Penn-Central Merger and N & W Inclusion Cases,* 389 U.S. 486, 493 (1968). Congress has consistently expressed its intent that the Commission's "exclusive and plenary" authority to approve merger applications and to impose reasonable terms and conditions that remove burdensome state law restraints be read broadly to achieve this important national goal. *Seaboard Air Line R.R. Co.* v. *Daniel,* 333 U.S. 118, 125 (1948).

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* This strengthening of the Commission's authority in Section 5 some six years after this Court's decision in *Texas* v. *United States,* 292 U.S. 522 (1934), discussed in Section I, *supra,* clearly evidenced Congress' approval of this Court's affirmation of the Commission's power to nullify burdensome state law restraints.

With the advent of the new, expedited merger procedures, consolidation of the nation's railroads will continue at an accelerated pace. Clarification of the Commission's authority to free these newly-formed rail systems from burdensome state and local restraints is of paramount public importance. By denying the Commission power to deal with state and local restraints that burden proposed mergers and consolidations and interfere with the realization of the economies and efficiencies that otherwise would flow from these transactions, the court of appeals has placed the protection of local parochial interests above the Congressional policy of developing a strong, efficient national transportation system through merger and consolidation.

III. THE DECISION BELOW IS CONTRARY TO DECISIONS OF OTHER COURTS OF APPEALS CONSTRUING THE COMMISSION'S AUTHORITY TO NULLIFY RESTRAINTS ARISING FROM STATE AND FEDERAL LAW.

The decision below should be reviewed by this Court for the further reason that its interpretation of the Commission's power under Section 5 of the Act is directly contrary to that of the Court of Appeals for the District of Columbia Circuit in *Altman* v. *Central of Georgia Ry. Co.*, 488 F.2d 1302 (D.C. Cir. 1973), and the Court of Appeals for the Eighth Circuit in *Brotherhood of Locomotive Engineers* v. *Chicago & North Western Ry. Co.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963).

In *Altman*, preferred shareholders of Central of Georgia Railway Co. brought suit for unpaid dividends for years prior to 1969 that were claimed to be due and owing under the road's charter and by-laws. The Commission had approved an application in January, 1971, resulting in the

merger of the company with the Southern Railway Co. and three of its subsidiaries. The Commission determined that Central of Georgia shareholders were entitled to $84 per share as the just and reasonable value thereof. The court of appeals, relying on *Schwabacher* v. *United States*, 334 U.S. 182 (1948), affirmed the dismissal of these claims, noting that:

> "Appellants' claim of right to additional dividends derives solely from state law, and it does not survive the final order of the Commission approving the consolidation, which order includes the provisions of $84 in respect of each preferred share of Central." (488 F.2d at 1305).

The Court of Appeals for the District of Columbia Circuit did not scrutinize the state law restraint to determine whether it "stood in the way" of the proposed merger, or to determine whether its nullification by the Commission was "necessary" to the completion of the consolidation. In finding no such limitations emanating from §5(11) of the Act, the Court of Appeals for the District of Columbia Circuit's decision is in direct conflict with the decision of the court below.

Also in direct conflict with the decision below is the holding of the Court of Appeals for the Eighth Circuit in *Brotherhood of Locomotive Engineers, supra.* There the court of appeals held that the arbitration provisions of a Commission-approved agreement between the merging roads and a union nullified the dispute resolution procedures of the Railway Labor Act. The court of appeals concluded that §5(11) of the Interstate Commerce Act had the effect of "relieving the carrier from all other restraints of federal law." (314 F.2d at 431-432). The decision of the Court of Appeals for the Eighth Circuit is directly contrary to the limitation construed in §5(11) by the court be-

low.* Resort to the dispute resolution procedures of the Railway Labor Act would not have "stood in the way" of or prevented the merger, as the court below would require. In fact, the formal aspects of the merger had already been accomplished, leaving only the post-merger consolidation of facilities at various common points. The dispute before the court involved the efforts of the surviving corporate entity to realize some of the potential economies of the merger by consolidating yard facilities. The dispute resolution procedures of the Railway Labor Act were not restraints on effectuation of the transaction approved by the Commission but were instead impediments to the realization of its maximum benefits. The decision of the Court of Appeals for the Eighth Circuit is thus diametrically opposed to the decision of the court of appeals in this case.

These conflicting holdings of the courts of appeals provide a compelling need for review of the decision below.**

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* That the Court of Appeals for the Eighth Circuit interpreted §5(11) as merely describing the legal effects of a Commission merger approval, rather than imposing a restriction on the Commission's power to approve conditions nullifying state law restraints, is clear from its quotation from *St. P., M. & O. Ry. Lease,* 295 I.C.C. 696, 702 (1958):

> "The terms of this paragraph [§5(11)] are self-executing, and there is no need for this Commission expressly to order or declare that a carrier be relieved from certain restraints. It is sufficient if we make clear what the carrier is authorized to do."

** The decision below is also contrary to the Commission's own interpretation of its powers under Section 5. *See St. Louis Southwestern Ry Co. of Texas Lease,* 290 I.C.C. 205 (1953), and decisions cited therein at 212-213. This Court has repeatedly held that an administrative agency's construction of its governing statute is entitled to

(Continued)

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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December 19, 1977

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* (Continued)

controlling weight. *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965); *Red Lion Broadcasting Co., Inc.* v. *FCC,* 395 U.S. 367, 381 (1969); *Lewis* v. *Martin,* 397 U.S. 552, 559 (1970); *Zeber* v. *Allen,* 396 U.S. 168, 192 (1969); *Zemel* v. *Rusk,* 381 U.S. 1, 11-12 (1965).

Finally, the Texas courts have acknowledged the Commission's power to nullify burdensome state law restraints such as the Palestine Agreement. *See St. Louis Southwestern Ry. Co. of Texas* v. *City of Tyler,* 422 S.W.2d 780, 784-785 (Tex. Ct. Civ. App. 1967), *applic. for writ of error refused.*

APPENDIX

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APPENDIX

Section 5 of the Interstate Commerce Act, as amended (49 U.S.C. §5):

§ 5. Combinations and consolidations of carriers

• • •

Unifications, mergers, and acquisitions of control; procedures applicable

(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) or paragraph (3) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed

transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

• • •

Plenary nature of authority under section

(12)* The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation

* Section 403(a) of the Railroad Revitalization and Regulatory Reform Act of 1976 (Pub. L. 94-210, 90 Stat. 63) redesignated former paragraph (11) of Section 5 as paragraph (12). The Commission's decision and the Fifth Circuit opinion herein refer to this paragraph as (11), and, consequently, that designation is used in this Petition.

participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

CITY OF PALESTINE, TEXAS, et al., Petitioners,

v.

UNITED STATES of America, Interstate Commerce Commission and Missouri Pacific Railroad Company, Respondents.

William M. GIBBONS, Trustee of Chicago, Rock Island and Pacific Railroad Company, Debtor, Petitioner,

v.

The UNITED STATES of America and the Interstate Commerce Commission, Respondents.

Nos. 76-2689 and 76-3507.

United States Court of Appeals, Fifth Circuit.

Sept. 19, 1977.

On Petitions for Review of an Order of the Interstate Commerce Commission. (Texas Cases)

Before COLEMAN, Circuit Judge, KUNZIG, Judge,* and GEE, Circuit Judge.

GEE, Circuit Judge:

We are called upon to review certain collateral aspects of an Interstate Commerce Commission (ICC) order granting authority to merge under section 5(2) of the Interstate Commerce Act, 49 U.S.C. §5(2), to Missouri Pacific Railroad Company (MoPac) and its principal subsidiaries, the Texas and Pacific Railway Co. (T&P) and Chicago & Eastern Illinois Railroad Co. (C&EI). The merger was unopposed, but two controversies surrounding the petition for merger concern us here. The first involves an agreement between MoPac and the City of Palestine, Texas, to maintain a specified number of employees at Palestine. The second involves the intervention by the Trustees of the bankrupt Chicago, Rock Island and Pacific Railroad Company (Rock Island), who requested indemnity for al-

* Judge of the United States Court of Claims, sitting by designation.

leged traffic losses due to the merger or, alternatively, for inclusion in the merger. The ICC relieved MoPac of its agreement with Palestine and denied Rock Island's request for indemnity or inclusion. We reverse the ICC's first action, but affirm the second.

I. *City of Palestine.*

An understanding of the MoPac-Palestine conflict requires a review of the history of the 1954 Palestine agreement. On March 15, 1872, Galusha Grow, President of the Houston & Great Northern Railroad Company (H&GN), entered into an agreement with Judge John H. Reagan to extend H&GN's railroad line to Palestine, to establish a depot within one-half mile of the courthouse, and to commence running cars regularly to Palestine by July 1, 1873. H&GN also agreed to locate and establish and forever thereafter keep and maintain the general offices, machine shops and roundhouses of H&GN in the City of Palestine. In consideration of these promises from H&GN, Judge Reagan agreed to induce the electorate of Anderson County, in which Palestine is located, to issue interest-bearing bonds on the credit of the county in the sum of $150,000 and to deliver those bonds to H&GN. The voters of Anderson County approved the bonds, and H&GN fulfilled its part of the agreement.

International Railroad Company (IRC) also possessed a railroad line to Palestine running from Hearne, Texas. In September of 1873, the stockholders of IRC and H&GN agreed to a merger of the two companies into one corporation. The International & Great Northern Railroad Co. (I&GN). This merger was approved in 1874 by the Texas Legislature as required by state law at that time. The legislative approval expressly provided that all acts done in the name of either of the companies should have the same binding force and effect upon the merged company. In 1875, then, I&GN agreed to establish its offices, machine shops and roundhouses at Palestine. The consideration for this agreement was again the $150,000 in interest-bearing bonds given to H&GN plus an agreement by the citizens

of Palestine to construct, at their own cost and expense, housing for the officers and employees of the company.

Thereafter, I&GN fell upon hard times. In 1911, after a number of financial machinations—none of which are relevant here—, I&GN faced foreclosures of mortgages on all of its corporate buildings. Certain creditors undertook a reorganization of I&GN by the creation of a new corporation that would succeed to all of the rights and liabilities purchased by the creditors at the foreclosure sale. This new company was also called International & Great Northern Railroad. Its corporate charter filed with the Secretary of State of the State of Texas provided that the offices of the new company would be in Houston, Texas.

Anderson County and the City of Palestine responded to the indicated change of corporate headquarters with a suit for an injunction to enforce the 1872 agreement. A spirited legal battle followed involving two Texas courts of civil appeals, *see International & Great Northern Railway Co.* v. *Anderson County,* 174 S.W. 305 (Tex.Civ.App.—Texarkana 1915, writ ref'd); *International & Great Northern Railway Co.* v. *Anderson County,* 150 S.W. 239 (Tex.Civ.App.—Galveston 1912, writ granted); the Texas Supreme Court, *see International & Great Northern Railway Co.* v. *Anderson County,* 106 Tex. 60, 156 S.W. 499 (1913); and the United States Supreme Court, *see International & Great Northern Railway Co.* v. *Anderson County,* 246 U.S. 424, 38 S.Ct. 370, 62 L.Ed. 807 (1918).[1]

[1] The trial court granted a preliminary injunction preventing I&GN from moving its headquarters from Palestine. This was appealed to the Court of Civil Appeals, *see International & G. N. Ry. Co.* v. *Anderson County,* 150 S.W. 239 (Tex.Civ.App.—Galveston 1912, writ granted), and the Texas Supreme Court, *see International & G. N. Ry. Co.* v. *Anderson County,* 106 Tex. 60, 156 S.W. 499 (1913). Although the question in the above cases primarily concerned venue, the courts addressed themselves to the merits by upholding the injunction. After final judgment on a jury verdict in favor of Anderson County and Palestine,

I&GN's primary argument against the injunction action was that it was a new corporation not bound by the contractual obligation of the old company. The Texas cases construing these facts clearly indicate that I&GN was correct if the only obligation to maintain its offices, shops and roundhouses in Palestine derived from the 1872 contract. The contract alone was a personal obligation that would not have bound the new company. *See International & Great Northern Railway Co.* v. *Anderson County,* 150 S.W. 239, 251 (Tex.Civ.App.—Galveston 1912, writ granted); *International & Great Northern Railway Co.* v. *Anderson County,* 106 Tex. 60, 156 S.W. 499, 502 (1913). Nevertheless, each court found the new company impressed with the obligation of maintaining its offices, shops and roundhouses in Palestine because of a Texas statute. That statute provided, in pertinent part, that a railroad company chartered by the state without charter-designated office location

> shall keep and maintain its general offices at such place within this state where it shall have contracted or agreed, or shall hereafter contract or agree, to locate its general office for a valuable consideration. . . . And such railroads shall keep and maintain their machine shops and roundhouses, or either, at such place or places as they may have contracted to keep them for a valuable consideration received; and, if said general offices and shops and roundhouses, or either, are located on the line of a railroad in a county which has aided said railroad by an issue of bonds in consideration of such location being made, then said location shall not be changed; and this shall apply as well to a railroad that may have been consolidated with an-

[1] (Continued)
the railroad appealed again and lost in the Court of Civil Appeals, *see International & G. N. Ry. Co.* v. *Anderson County,* 174 S.W. 305 (Tex.Civ.App.—Texarkana 1915, writ ref'd), and the United States Supreme Court, *see International & G. N. Ry. Co.* v. *Anderson County,* 246 U.S. 424, 38 S.Ct. 370, 62 L.Ed. 807 (1917).

other as to those which have maintained their original organization.

Tex.Rev.Civ.Stat.Ann. art. 6423 (1911) [now found in Tex. Rev.Civ.Stat.Ann. arts. 6275, 6277 (1926)]. Because the previous company had contractually agreed to maintain its offices, shops and roundhouses at Palestine, the statute had the effect of making this agreement a continuing obligation on the part of the new company. *See International & Great Northern Railway Co.* v. *Anderson County,* 106 Tex. 60, 156 S.W. 499, 503-05 (1913). The United States Supreme Court refused to overturn the state court's interpretation of the effect of the statute and also ruled the statute constitutional. *See International & Great Northern Railway Co.* v. *Anderson County,* 246 U.S. 424, 432-34, 38 S.Ct. 370, 62 L.Ed. 807 (1918). Thus, the 1914 judicial decree of the District Court of Cherokee County forever bound I&GN to maintain its general offices, machine shops and roundhouses in Palestine.

Subsequent to this decree, I&GN was acquired by Missouri Pacific (MoPac). Unfortunately, MoPac suffered bankruptcy shortly thereafter, and on March 31, 1933, MoPac and its subsidiaries filed petitions in bankruptcy requesting approval of a proposed plan of reorganization under section 77 of the Bankruptcy Act. The proposed plan of reorganization filed with the ICC provided for a consolidation of the subsidiaries of MoPac, including I&GN, into a united company. The 1914 decree proved an impediment to this consolidation. Subsection (n) of section 77 of the Bankruptcy Act protected the 1914 judicial decree from the power of the bankruptcy court:

> No reorganization effected under this title and no order of the court or Commission in connection therewith shall relieve any carrier from the obligation of any final judgment of any Federal or State court rendered prior to January 1, 1929, against such carrier or against one of its predecessors in title, requiring the maintenance of offices, shops, and roundhouses at any place, where such judgment was rendered on ac-

> count of the making of a valid contract or contracts by such carrier or one of its predecessors in title.

11 U.S.C. § 205(n) (1970). In light of this proscription, the bankruptcy court held out the possibility that I&GN could be operated as a separate company but preferred that MoPac secure a modification of the 1914 decree so that the planned unification could be complete.

Thus, in 1954, MoPac entered into negotiations with the City of Palestine and Anderson County to secure a modification of the 1914 decree and the 1872 contract. On December 21, 1954, the parties executed the "Palestine Agreement" in which MoPac agree to forever maintain in Palestine 4.5% of all of its employees in certain job classifications. In consideration of this agreement, the City of Palestine and Anderson County agreed to a modification of the 1914 decree to reflect MoPac's new agreement and waived any cause of action against MoPac for noncompliance with the 1914 judgment. On March 2, 1955, the District Court of Cherokee County, Texas, entered a judgment modifying the 1914 decree in accordance with the 1954 Palestine Agreement. The Agreement had the effect of releasing I&GN from its obligations to maintain its general offices, shops and roundhouses in Palestine, and MoPac and I&GN were consolidated.

This case arises from MoPac's attempt to rid itself of the 1954 Palestine Agreement. In connection with its application for ICC approval of a voluntary merger plan designed to unify MoPac with two subsidiaries—Texas & Pacific Railway Co. (T&P) and Chicago & Eastern Illinois Railroad Co. (C&EI)—MoPac asked the ICC to relieve it from the requirements of the 1954 Palestine Agreement. *See* Missouri Pacific Railroad Co.—Merger—The Texas & Pacific Railway Company and Chicago & Eastern Railway Company, 348 I.C.C. 414 (1976). The ICC ruled that it had the power to abrogate the 1954 Palestine Agreement and that, in light of the agreement's unduly burdensome effect on MoPac and on interstate commerce, it would exercise its power to abrogate the agreement. 348 I.C.C. at 430.

The City of Palestine, joined by intervenor Railway Employes' Department, AFL-CIO, appeals that part of the ICC's order abolishing the 1954 Palestine Agreement. Palestine asserts that the ICC lacked power to void a valid contract between a railroad and a third party and that, even assuming the ICC had such power, the Commission exceeded its authority in abrogating this contract. Respondent MoPac and the ICC understandably argue that the Commission could relieve MoPac from the burdens imposed by the Palestine Agreement and properly exercised its discretion in doing so.

To encourage the realization of its national policy of an integrated, efficient and coordinated system of rail transport, Congress empowered the ICC to approve voluntary mergers and consolidations designed to produce efficient and economical railway service in the public interest. In 49 U.S.C. § 5(2), Congress granted the ICC the power to approve voluntary railroad consolidations, mergers, acquisitions and other transactions provided that the proposed transaction is "consistent with the public interest," "just and reasonable" and properly approved by the stockholders of the affected parties.[2] *Schwabacher* v. *United*

[2] (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) For two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; . . .

(b) . . . If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent wtih the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable. . . .

49 U.S.C. § 5(2) (1970).

States, 334 U.S. 182, 194, 68 S.Ct. 958, 92 L.Ed. 1305 (1948). In section 5(11), Congress granted the ICC exclusive and plenary power to effectuate the transactions approved under the power vested in the Commission in section 5(2). An approved transaction goes into effect without the need for state approval and free of any "restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable [the carriers] to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission. . . ." 49 U.S.C. § 5(11) (1970).[3] Both parties look to an interpretation of section 5(11) to determine the ICC's power to abrogate the Palestine Agreement.

Palestine and MoPac battle mightily over two questions that our disposition of the case renders unnecessary for our decision. The first is the respondents' claim that the 1954 Palestine Agreement is not a true contract but instead derives its power from the Texas statutes requiring railroad companies to continue maintaining their offices, shops and roundhouses in their previously established locations. *See* Tex.Rev.Civ.Stat.Ann. art. 6275-80 (1926). In *Texas* v. *United States,* 292 U.S. 522, 54 S.Ct. 819, 78 L.Ed. 1402 (1934), the Supreme Court ruled that the ICC had the authority to relieve interstate carriers from the effects of the Texas statutes as a concomitant to its power to approve a lease of one railroad by another. Finding that the consolidation of operations in one office outside the state would avoid waste and thus promote the public interest in economy and efficiency of rail transportation, the Court ruled that the ICC's attempt to secure these advantages was well within the congressional purpose of the statute and thus within the ICC's ability. Section 5(11) confirmed that the ICC may pursue the public interest

[3] In 1976, Congress amended certain provisions of the Transportation Act, leading to a redesignation of former § 5(11) as § 5(12). *See* 49 U.S.C.A. § 5(12) (Supp.1977). For convenience, we will continue to refer to the present § 5(12) as § 5(11).

unfettered by state law. Pointing to *Texas* v. *United States,* the respondents argue here that the 1954 agreement was intimately related to Texas law. Without the 1954 agreement, respondents claim, MoPac would have remained bound by the 1914 judicial decree. Had MoPac failed to perform the 1954 Palestine Agreement, the 1914 decree could be reinstated. Respondents urge that these incidents to the 1954 agreement render it indistinguishable from the state statutes that led to its birth and thus subject to the ICC power recognized in *Texas* v. *United States.* Palestine asserts that the contract was a separate agreement supported by valid consideration.

The second claim is respondents' contention that even if the Palestine Agreement is viewed only as a contract the ICC has the power under section 5(11) to abrogate it. Palestine rejoins that Congress did not intend to give the ICC this power.

We need not resolve either of these questions because, assuming for the purpose of argument that the ICC has the power to abrogate this contract, we conclude that the ICC's power only extends to setting aside state restraints to the effectuation of an approved section 5(2) transaction and no further. Although the Palestine Agreement may burden MoPac, the agreement clearly is not an obstacle to the merger of T&P and C&EI and does not threaten the merger's success. The ICC exceeds the scope of its authority when it voids contracts that are not germane to the success of the approved section 5(2) transaction.

In its grant of approval authority, Congress did not issue the ICC a hunting license for state laws and contracts that limit a railroad's efficiency unless those laws or contracts interfered with carrying out an approved merger. *See Schwabacher* v. *United States, supra,* 334 U.S. at 207, 68 S.Ct. 958 (Frankfurter, J. dissenting). *Cf. Texas & New Orleans Railroad Co.* v. *Brotherhood of Railroad Trainmen,* 307 F.2d 151, 158-60 (5th Cir. 1962) (ICC exceeded authority when dictated labor contract as part of approval of yard agreement between railroads). Section

5(11)'s description of the freedom enjoyed by carriers in an approved merger recognizes that the carriers' immunity from state law extends only "*insofar as may be necessary to enable them to carry into effect* the transaction so approved or provided for. . . ." 49 U.S.C. § 5(11) (1970) (emphasis supplied). These words express a practical limitation on the power of the ICC. The ICC's pursuit of the public interest focuses on its approval of railroad mergers, consolidations, acquisitions, and other section 5(2) transactions. Actions taken by the ICC in connection with those transactions but not necessary to them exceed the scope of its authority. In section 5(11) Congress clearly expresses a sensitivity to state law: the ICC's approval may overturn state law only where "necessary to carry into effect" the transaction. The ICC has shown little sensitivity in this case.

The Palestine Agreement has no role in the ICC's analysis of the proposed voluntary merger of MoPac, T&P and C&EI. The merger, although increasing the number of "MoPac" employees, will not require an increase in the number of personnel in Palestine: the Agreement provides for a downward adjustment of the percentage of people employed in Palestine in the case of merger. The merger is merely a "corporate simplification" designed to bring two near-wholly owned subsidiaries under the banner of the parent company—the three companies have operated as one system for several years. The Administrative Law Judge and the ICC concluded that the Palestine Agreement was a burden on MoPac and interstate commerce, but there is no indication that this burden presents any obstacle to the merger. Despite the irrelevance of the Palestine Agreement to the merger, the ICC has gratuitously relieved MoPac of its contractual obligations. We cannot countenance this action.

Precedent in the Supreme Court suggests that the ICC may shoulder aside state restraints in its approval of mergers only when such action is necessary to the effectuation of the merger. In *Texas* v. *United States, supra,* the Texas statutes on offices, shops and roundhouses, Tex.Rev.

Civ.Stat.Ann. art. 6275-80 (1926), threatened to prevent one railroad's lease of another by requiring that the lessor forego consolidation with the offices of the lessee as the price of leasing a Texas-based railroad. In *Seaboard Airline Railroad Co.* v. *Daniel,* 333 U.S. 118, 68 S.Ct. 426, 92 L.Ed. 580 (1948), South Carolina constitutional provisions forbidding non-South Carolina chartered railroads from operating in the state would have negated an ICC-approved acquisition of a South Carolina railroad's lines by another railroad. In *Schwabacher* v. *United States, supra,* the insistence on further compensation by preferred stockholders of a merging company exceeded the compensation found just and reasonable in the ICC's approved plan of merger. In each of these cases the voided state-related provision impinged upon the effectuation of the section 5(2) transaction. In describing the ICC's power under section 5(11), the court has characterized it as "the power of the Interstate Commerce Commission, *in the exercise of its statutory obligations,* to override state laws *imposing obstacles* in the path of otherwise lawful plans of reorganization." *Callaway* v. *Benton,* 336 U.S. 132, 140-41, 69 S.Ct. 435, 441, 93 L.Ed. 553 (1949). In all of the cases approving the ICC's nullification of state law, the laws stood in the way of the approved transaction.

Our evaluation of the ICC's power might differ if Congress had granted the Commission direct authority to nullify any contract presenting a burden on interstate commerce, but we find no congressional award of such power to the ICC independent of its power of approval of section 5(2) transactions. From this statutory scheme we deduce that Congress intended to empower the ICC to set aside state law restraints only insofar as necessary to assure the effectuation of approved transactions. Here the Palestine Agreement does not affect the "corporate simplification" merger—in fact, the united system of MoPac, T&P and C&EI has already operated successfully for some time under the Agreement. No doubt the merged MoPac system would operate more efficiently and free of "burdens on interstate commerce" without the strictures of the Palestine Agreement, just as it would operate more efficiently and free of "burdens on interstate commerce" if it were relieved of its contractual obligation to pay its debts or a bargained-for wage scale. Congress allowed the ICC significant power to effectuate approved transactions, but it did not authorize gratuitous destruction of contractual relations—even when it serves the general public interest—when the destruction is irrelevant to the success of approved transactions.

II. *Chicago, Rock Island and Pacific Railroad Co.* (*Rock Island*).

Rock Island is a not-very-successful competitor of MoPac in the midwest and southwest. The Administrative Law Judge succinctly described the nature of Rock Island's business and its status with regard to the merger applicants:

> Rock Island lines comprise approximately 7,000 miles of railroad in the States of Illinois, Iowa, Kansas, Missouri, Nebraska, Minnesota, Colorado, Arkansas, Tennessee, Oklahoma, Texas, New Mexico and Louisiana. Rock Island maintains through routes and joint rates with the applicants, interchanges traffic with them, and is competitive with them on substantial volumes of traffic moving from, to, and within the territory it serves. Rock Island interchanges with the applicants at numerous points, among them: with the MoPac at St. Louis, Fort Worth, Houston, Kansas City, Little Rock, Memphis, Topeka, and Wichita; with the C&EI at Chicago and St. Louis; and with the T&P at Dallas, Fort Worth and Alexandria.

Just a month before the ALJ's hearing on the MoPac merger on April 15-16, 1975, Rock Island voluntarily filed a petition for reorganization under section 77 of the Bankruptcy Act, 11 U.S.C. § 205, in federal district court in Illinois. Unlike the other intervenors in the MoPac merger,[4]

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[4] Six other railroads intervened in the proceedings: Missouri-Kansas-Texas, Illinois Central Gulf, St. Louis-San Francisco, St. Louis-Southwestern, Santa Fe, and Southern.

the trustee of Rock Island was not satisfied with the protective traffic conditions prescribed in Detroit, T. & I.R. Co. Control, 275 I.C.C. 455 (1950), imposed upon the merging parties by the ICC and sought indemnity for diversion of traffic from Rock Island by the new line.

Rock Island made no substantive presentation at the April hearings in support of its claim for indemnity, but on May 15, 1975, it filed a verified statement and exhibits in support of its estimates of traffic diversion due to the merger. On July 9-10, 1975, the ALJ held a hearing at which Rock Island adduced its evidence and was subjected to cross-examination by the applicants.

Rock Island also sought inclusion in the merger. On May 20, 1975, Rock Island asked the ICC to allow the trustee time to decide whether to seek inclusion in the merger. On September 23, 1975, the district judge overseeing Rock Island's reorganization authorized a petition for inclusion in the MoPac merger that was filed with the ICC on September 25, 1975. The next day the ALJ handed down his initial decision denying Rock Island's request for indemnity or inclusion. Rock Island sought to reopen the hearings to show why inclusion of Rock Island in the merger would be in the public interest. The ICC denied the attempt to reopen the proceedings and affirmed the ALJ's initial decision. Rock Island appealed to the Seventh Circuit, and that circuit transferred Rock Island's appeal to our circuit for consideration with the pending matter of MoPac and the City of Palestine. We affirm the ICC's order.

Rock Island based its request for indemnification on documentary evidence and testimony that the proposed merger would produce wide-scale diversion. Based on studies of 1974 traffic, Rock Island claimed that some 7,047 carloads would be diverted from Rock Island by the MoPac. The initial decision of the ALJ best explains Rock Island's methodology in producing this figure:

> Rock Island conducted a traffic study in order to determine a projected effect the merger of the applicants would have upon its present traffic level. Revenue settlements for 1974 on interline shipments with each of the applicants provided the basis for a computer printout used in the traffic diversion analysis. These settlement reports indicated that the interchanged cars totaled 43,541 with the revenue portion of Rock Island amounting to $15,113,608.
>
> The computer printout contained the following information for each traffic movement: origin State and station; destination State and station; commodity code number and description; originating and terminating junction and connecting railroad; number of trailers; number of cars; shipment weight; miles; and Rock Island revenue. There were 685 pages in the printout with 9,523 line items. Many single car movements were shown; however, when all of the routing factors designated on the report were the same, multiple movements were shown on one line.
>
> Rock Island established the following guidelines for marking traffic movements on the computer printout for diversion to the proposed new merged system: (1) all traffic originating or terminating at Chicago and originating and terminating at MoPac and T&P destinations will be lost 100 percent; (2) all traffic interchanged by Rock Island at Chicago with Eastern carriers and originated and terminated on MoPac or T&P will be lost 100 percent; (3) traffic originating on MoPac or T&P in the southwest and terminating at Rock Island stations, Des Moines and east, including lines north and south of Des Moines, to Iowa-Missouri border, and presently received in interchange at various junctions (Kansas City, Ft. Worth etc.,) will move over the merged system to Chicago, thence Rock Island; (4) traffic originated by Rock Island at points east of the Mississippi River and interchanged with MoPac or T&P at various junctions for termination on MoPac or T&P will move via Chicago; (5) westbound transcontinental traffic currently received from MoPac and

delivered to Southern Pacific at Santa Rosa, New Mexico, will be lost to MoPac-El Paso-Southern Pacific route; (6) eastbound transcontinental traffic to the southeast and southwest destinations now received from Southern Pacific at Santa Rosa (Tucumcari gateway) and delivered to MoPac will be lost to Southern Pacific-El Paso-MoPac; (7) Louisiana and Texas shipments originated by MoPac and T&P and now interchanged to Rock Island at Ft. Worth for delivery to connections at Kansas City will move over the merged system to those Kansas City connections; and (8) similar traffic destined to MoPac common points with Rock Island in Kansas, Missouri and Nebraska (Lincoln and Omaha) will move MoPac direct. In addition to the guidelines, instructions were issued not to record for diversion any traffic movement that physically would be unaffected by the merger.

Rock Island's selection of the first four guidelines was based on the following considerations: (1) the proposed merger will result in longer single-line MoPac routes, which would give the merged system a greater ability to outmuscle Rock Island on competitive traffic; (2) MoPac can afford a larger solicitation budget than Rock Island; (3) MoPac has a larger supply of equipment than Rock Island and the mix is greater; and (4) MoPac has a long-haul routing policy. The last four guidelines were established because Rock Island believes that the new MoPac will emerge with so much clout that Rock Island will be short-hauled on all the traffic identified therein.

Rock Island's traffic expert and an associate reviewed all traffic movements shown on the computer printout to determine if the newly merged system would have the power to divert traffic handled by the Rock Island in 1974. Shipments that could be completely diverted were noted. Alternative routes, including changed interchange points, were posted for short-hauls or partial diversions. As pages of the

computer listing were completed they were given to the Assistant Manager-Pricing (Divisions Section) for entry of divisions percents in connection with short-haul notations as a predicate for calculation of revenue losses for partial diversions.

On the basis of the traffic diversion study, Rock Island concluded that 7,047 interline carloads, which yielded $2,614,997 in gross freight revenues in 1974, would be lost within one year after the merger. Subsequent to cross-examination of its traffic witness and the applicants' rebuttal evidence, Rock island conceded that the estimated revenue loss was overstated by at least $83,394. Therefore, this amount was deducted from the original $2,614,997 estimate loss leaving a potential annual revenue loss of $2,531,603 based upon 1974 rate charges. Rock Island contends that 1974 revenues must be updated to reflect the general rate increases that have occurred since. Making allowance for holddowns and flagouts, Rock Island asserts that its revenue loss which was based on 1974 should be increased by 19 percent in order to bring revenue up to rate levels that will be in effect the last quarter of 1975. Thus, the carrier estimates that it would suffer an annual loss of gross revenue approaching $3 million.

Missouri Pacific Railroad Co.—Merger—The Texas and Pacific Railway Company and Chicago & Eastern Illinois Railroad Company, I.C.C. Finance Docket No. 27773 (Sept. 18, 1975).

The ALJ, with the later support of the ICC, chose not to credit Rock Island's traffic study. He did so because he found the study failed to take into account significant facts needed to determine accurately the likelihood of diversion of the 7,047 cars claimed. He also discounted the considerations underlying the first four guidelines used to establish divertible traffic on the grounds that no significant difference existed between a single-system route and a single-line route; that evidence indicated that the

merger would not increase. MoPac's solicitation budget because the traffic departments of the three lines are already integrated; that MoPac's long-haul routing policy—common in the industry—had no significant impact on Rock Island[5]; and that equipment differences between MoPac and Rock Island were not significant because MoPac had larger system needs and because a comparison of the equipment mix between the parties yielded no important differences. In short, the ALJ found Rock Island's traffic study questionable—certainly not sufficient to support indemnification because of diversion. After examining the record the ICC also concluded that Rock Island's traffic study was not compelling.

After our examination of the record, we believe the ICC had substantial evidence warranting its rejection of Rock Island's traffic study. Although its evidence represented a paper showing of *potential* diversion, Rock Island presented no evidence conclusively indicating that diversion *would* take place. More important, Rock Island made no convincing showing why a diversion would occur under the new MoPac system which had not occurred under the old family of parent MoPac and subsidiaries T&P and C&EI. The financial incentives for diversion were the same,

[5] The long-haul routing policy is a device to increase the revenue of the delivering railroad. When a shipper designates two railroads to haul a shipment, the first must transfer the cargo to the second in the process of delivery. If, however, the shipper has not designated a junction at which the transfer takes place, the first railroad may deliver to the second at any common point within the tariff schedules. Given several common points at which transfer can take place, the first railroad will deliver at the junction that provides it the longest haul.

The MoPac merger has special significance for Rock Island that further ameliorates any diversion. The merger provides Rock Island with a greater number of MoPac common points, giving it an opportunity for longer hauls. Studies by MoPac, cited by the ALJ, indicated that Rock Island's long-haul potential was far greater than MoPac's after the merger.

but Rock Island gave no significant explanation of how a name change and consolidation of an existing unitary system could cause greater harm than separate entities.[6] In fact, the ICC noted that all of the diversions claimed by Rock Island were possible under the present MoPac-T&P-C&EI system and that normal solicitation efforts by the applicants had not produced diversion in the past. After reviewing the record and the ICC's decision, we conclude that substantial evidence supported the ICC's denial of Rock Island's claim for indemnity.

In support of its petition for inclusion,[7] Rock Island

[6] At oral argument counsel for Rock Island suggested that shipping clerks, in designating connecting carriers, tried to minimize typing by selecting a small number of carriers or selecting carriers with few letters. The MoPac merger might give MoPac some benefit by eliminating T&P or C&EI as connections, thus foreclosing Rock Island's substitution because of its fewer letters (RI). Without evidence that this consequence in fact does significantly affect routing, we cannot overturn the ICC's determination.

[7] Rock Island complains that the ICC failed to provide adequate review of its petition for inclusion because the ICC characterized its petition as adding "no new information or contentions to the record, other than those which were adequately discussed and dismissed by the Administrative Law Judge." 348 I.C.C. at 424, when Rock Island had had its petition for inclusion on file only one day before the ALJ's initial decision. Rock Island claims that the ICC relied on the ALJ's actions to reject the petition for inclusion when the ALJ had taken no significant action.

Were this the case we would be concerned, but it is clear that the ICC adequately examined and considered Rock Island's petition for inclusion. The petition was on file with the ICC for over seven months before the ICC issued its report on the MoPac merger. Much of the Rock Island petition for inclusion depended on the diversion evidence adduced in support of its petition for indemnity. The ALJ's rejection of the diversion evidence also reflected adversely on the inclusion claim, and in that sense the ICC could rely on the ALJ's findings.

advanced several factors: its evidence of diversion from its lines by MoPac; the elimination of duplicative routes and facilities; and ICC approval of inclusion of other lines in voluntary mergers. The ICC agreed with the ALJ, as do we, that Rock Island did not present adequate evidence of actual diversion. Thus, diversion evidence did not support Rock Island's claim for inclusion.

Deprived of its major reason for inclusion, Rock Island asserts that the ICC abused its discretion by rejecting Rock Island's evidence that inclusion would streamline facilities, eliminate duplication of routes, and make for efficient rail transport in the public interest and that inclusion was warranted in light of previous inclusions in other voluntary railroad combinations. In reviewing ICC actions for abuse of discretion under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), we must grant due deference to the agency's decisions, reversing them only if we conclude that the agency lacked a rational basis for its action. *See Ethyl Corp.* v. *Environmental Protection Agency*, 176 U.S.App.D.C. 373, 541 F.2d 1, 34, *cert. denied*, 426 U.S. 941, 96 S.Ct. 2663, 49 L.Ed.2d 394 (1976). We find no abuse of discretion here.

The ICC concluded that Rock Island had not demonstrated that the inclusion of Rock Island in the MoPac merger was in the public interest. In doing so the ICC implicitly rejected Rock Island's claims that inclusion would promote the public interest in efficient service by concluding that it was in the public interest for the MoPac merger to go through as originally planned.[8] The merger

[8] The ICC's report does not clearly state whether its decision rested on its refusal to credit Rock Island's claims of efficiency or on a decision that, notwithstanding potential efficiency, the public interest was best served by approval of the merger as originally contemplated. Citing recent enactments evidencing congressional purpose to promote railroad revitalization by restructuring the rail system on a "more economically justified basis," see Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31, Rock Island urges that the ICC's

itself would not harm Rock Island. Further, the inclusion would so severely burden the merged system that the merger—already determined to be in the public interest—might not go through. The ICC could have chosen to include Rock Island, but we cannot say that its decision not to do so lacks rationality. This is especially true where the proposed merger is a mere corporate simplification with little or no real apparent impact on the party seeking inclusion.

On occasion the ICC has either ordered or held open for five years the possibility of inclusion of other railroads in connection with voluntary mergers. *See*, e. g., *Illinois Central Gulf Railroad Co.—Acquisition—Gulf, Mobile & Ohio Railroad Co., Illinois Central Railroad Co., et al.*, 338 I.C.C. 805 (1971); *Pennsylvania Railroad Co.—Merger—New York Central Railroad Co.*, 327 I.C.C. 475 (1966) (inclusion ordered); *Seaboard Airline Railroad Co. —Merger—Atlantic Coastline*, 320 I.C.C. 122 (1963). From those cases Rock Island argues that it should be included in the MoPac merger. These cases do not suggest an abuse of ICC discretion because they arose in different circumstances. In those cases the ICC considered inclusion because the proposed mergers involved major realignments that could adversely affect other railroads or, in

[8] (Continued)
cavalier dismissal of the efficiency claims supporting inclusion cannot be justified. At the very least, Rock Island asserts, the curtness of the ICC's rejection violates the Administrative Procedure Act, 5 U.S.C. § 557(c), which requires a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record . . . ." 5 U.S.C. § 557(c)(3)(A).

None of Rock Island's contentions have merit. The ICC's failure to enlarge upon its rejection of Rock Island's efficiency claims stemmed from its well-explained determination that regardless of potential efficiency the public interest was better served by approval of the MoPac merger as originally contemplated.

Pennsylvania, because inclusion posed an insignificant additional burden to a much larger system. Further, each merger involved anticipated savings in the millions that could ameliorate any inclusion that might occur. Here the ICC considers a corporate simplification—not a major realignment; the merger would not significantly affect Rock Island's operation. Inclusion of the financially straitened Rock Island may have been seen as a significant burden on the merged system, and the savings to be effected under the merger as not to justify the burden. The major distinguishing factor is, of course, that in the previous cases the ICC determined inclusion or receptivity to an inclusion petition to be in the public interest, and here it did not. In light of these differences, those cases do not suggest an abuse of the ICC's discretion in denying Rock Island's petition for inclusion.

III. *Summary.*

We have concluded that the ICC exceeded its authority to effectuate approved section 5(2) transactions when it abrogated the Palestine Agreement. We find the ICC's disposition of Rock Island's petitions for indemnity or inclusion supported by substantial evidence and not an abuse of its discretion. Except with regard to the ICC's action on the Palestine Agreement, we AFFIRM.

COLEMAN and KUNZIG, JJ., concur.

FINANCE DOCKET NO. 27773[1]

MISSOURI PACIFIC RAILROAD COMPANY—MERGER—THE TEXAS AND PACIFIC RAILWAY COMPANY AND CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY

Decided May 4, 1976

REPORT OF THE COMMISSION

BY THE COMMISSION:

Exceptions to the Administrative Law Judge's initial decision were filed by (1) applicant railroads, Missouri Pacific Railroad Company (MOPAC), The Texas and Pacific Railway Company (T&P), and Chicago & Eastern Illinois Railroad Company (C&EI); (2) the city of Palestine, Tex., and Anderson County, Tex.; and (3) William M. Gibbons, Trustee of the property of the Chicago, Rock Island and Pacific Railroad Company, Debtor (Rock Island). Replies were filed thereto by (1) applicants, and (2) the Railway Employees' Department, AFL-CIO (RED). Additionally, Rock Island, on September 25, 1975 (1 day before the initial decision was served), filed a petition, pursuant to section 5(2)(d) of the Interstate Commerce Act (the act), for inclusion in the subject matter. Applicants filed a reply thereto. Our conclusions differ in part from those of the Administrative Law Judge.

By joint application filed November 1, 1974, MOPAC and its principal subsidiaries, T&P and C&EI, seek authority, under section 5(2) of the act, (a) to merge the properties and franchises of T&P and C&EI with and into MOPAC, and (b) for MOPAC to acquire through ownership of stock, sole or joint control of carriers subsidiary to or affiliated with T&P and C&EI. MOPAC, as the

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[1] This report also embraces Finance Docket No. 27774, Missouri Pacific Railroad Company—Securities.

surviving corporation, seeks authority under section 20(a) of the act, to issue 972,772 shares of its common stock and to assume liability with respect to the securities which T&P or C&EI is liable as obligor or guarantor thereof. There is little dispute as to the facts in this proceeding and inasmuch as they are accurately and adequately detailed by the Administrative Law Judge in his decision, only those facts in dispute or necessary for clarity of discussion will be repeated here.

The Administrative Law Judge found that the proposed merger will be consistent with the public interest because it would permit further simplification of the corporate structure and the accounting and reporting requirements of applicant railroads, it would improve transportation and related service to communities and shippers served by them, and it would produce a more economical and efficient utilization of plant and equipment. Economies through simplification would be made through (a) the elimination of the necessity of maintaining separate corporate existences and making of multitudinous reports to various agencies, both State and Federal; (b) the elimination of the need of maintaining separate books of account and stock records; and (c) the centralization of certain administrative functions now separately maintained. Further, he found that since applicants are presently part of a coordinated system, common ownership will have no materially adverse effect on other railroads. Traffic will continue to move essentially via present routes and gateways, and there should be no material diversion of traffic or loss of revenue to other carriers. Accordingly, he imposed the standard traffic conditions first prescribed in *Detroit, T. & I. R. Co. Control* (*DT&I* case), 275 I.C.C. 455 (1950). Additionally, the Administrative Law Judge, in light of Rock Island's opposition to the proposed merger, imposed a condition retaining Commission jurisdiction over these proceedings for a period of 5 years following the consummation of the transaction for the purpose, among others, of considering (1) a petition under section 5(2)(d) of the act requesting inclusion in the merger, and (2) for good

cause shown, the imposition of such just and reasonable conditions upon petition by Rock Island as may be necessitated by any significant traffic problems arising from the approval of the merger. He required that consummation of the transactions authorized in the initial decision shall constitute irrevocable assent by applicants to the power of the Commission to impose, after hearing, such just and reasonable conditions as may be necessary or appropriate.

Further, the Administrative Law Judge required protective conditions for all employees affected by the proposals in conformity with the so-called attrition conditions for the protection of employees prescribed by the Commission in *Chesapeake & O. Ry. Co.—Control—Western Maryland Ry. Co.* (*Western Maryland* case), 328 I.C.C. 684 (1967).

Lastly, the Administrative Law Judge found that the Palestine Agreement[2] between the International-Great Northern Railroad Company and the city of Palestine, Tex., and Anderson County, Tex., and the laws of the State of Texas currently impose undue burdens and obligations on MOPAC and they will impose unduly burdensome, inefficient, injuriously wasteful, and unnecessary obligations on the proposed unified operations and upon interstate commerce. Accordingly, he relieved MOPAC from its obligations thereunder through the authority of the Commission under section 5(11) of the act.

* * *

The city of Palestine and county of Anderson except to the finding of the Administrative Law Judge that the Palestine Agreement is an undue burden on interstate commerce. They argue that such agreement is a private contract over which the Commission has no authority and which the Commission cannot void pursuant to section 5(11) of the act. In addition, they request oral argument.

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[2] A history of the Palestine Agreement is contained in the appendix attached herein.

* * *

Applicants also argue that the Palestine Agreement is not in reality a private contract, but is based on an injunction obtained against MOPAC's predecessor under Texas law. But even if it is a "private contract," applicants contend that the Commission has the authority under sections 5(2) and 5(11) of the act to relieve applicants of such agreement pursuant to its approval of a section 5 application. Accordingly, applicants contend that the Administrative Law Judge was correct in his findings and conclusions with respect to the authority of the Commission under section 5(11), and his finding that the Palestine Agreement is an undue burden on interstate commerce.

* * *

The facts involved in these proceedings generally are agreed upon, and the issues in dispute involve disagreements on the conclusions of law which are amply discussed and analyzed in the exceptions and replies. Accordingly, we conclude that nothing would be gained by ordering oral argument in these proceedings, and the requests therefor are denied.

Exceptions and arguments not specifically discussed herein have been considered and found to be without merit or unnecessary to the determination of the issues involved.

Discussion and Conclusions

* * *

The merger application herein does not involve significant changes in the pattern of operation of the MOPAC system, but merely represents a simplification of present MOPAC corporate structure. The proposed merger is nothing more than a consolidation of the corporate identities of the three applicant railroads, MOPAC, T&P, and C&EI. MOPAC has controlled the T&P through stock ownership for over 50 years, *Texas & Pacific Readjustment*. 86 I.C.C. 808 (1924), and has controlled the C&EI through stock ownership for over 10 years, *Missouri Pac.*

R. Co.—Control—Chicago & E.I.R. Co., 327 I.C.C. 279 (1965). MOPAC and T&P have been operating as a unified entity with assimilated power and equipment, and common departments and personnel for about 10 years. The C&EI has been operated on a assimilated basis with the other two railroads in the same manner for about 6 years. The operation of these three railroads on an integrated basis means that, unlike a proceeding where one railroad seeks to merge with another unaffiliated railroad, the coordination and combination of departments and personnel of merging railroads will not result in the customary significant economies involved in the elimination of duplicate departments.

The economies projected here are from the elimination of separate departments and records which must be maintained for the three corporate entities. These savings are explained in detail in the initial decision. Essentially, savings would result from the elimination of separate financial and administrative records and the reduction in the number of reports required by various Federal and State agencies. The principal department which would be affected here is the accounting department which, except for freight claim accounting, is located in St. Louis. This department maintains the accounting records for the entire MOPAC system, and separate books are also kept for each of the three corporations. Each corporation additionally maintains its own set of books and accounts independent of the central books. Applicants estimate that the consolidation of these separate accounts would eliminate 427 reports to Federal, State, and local governments, 1,450 internal management reports, and some 133,180 yearly accounting documents. The elimination of these and other duplicate functions are projected to save 35,396 man-hours of labor. The entire monetary savings for the accounting department would be approximately $440,000 per year.

Furthermore, the corporate consolidation would permit the simplified handling of waybills through MOPAC's central computerized waybill production system, the im-

proved utilization of the car fleet of the three railroads, and the solicitation of traffic for a single MOPAC routing rather than the present three-carrier routing.

While the administrative economies from corporate simplification are significant, the evidence of record indicates that the operational advantages from this merger will be minimal. No substantial economies should be realized from the elimination of duplicate lines or facilities because these three railroads are virtually end to end. According to applicants, since they are already operating a coordinated system under the common control of MOPAC, the new direct ownership can have no adverse effect on other railroads. Traffic will continue to move as it presently does, and joint rates and through routes involving one or more of the three companies will be maintained after the merger. The divisions of revenue on joint-line traffic accruing to each of the three corporations, when one or more of them are in a joint-through route, will be cumulative for the merged corporation. The divisions of revenue for other railroads participating in joint rates should remain the same. In view of these conclusions, it is difficult to perceive any significant advantage obtainable by a consolidated MOPAC through corporate simplification which would enable it to divert significant amounts of traffic from competing railroads.

One possible alteration brought out at the hearing is a minor change in routing that could be made by MOPAC where junctions between connecting carriers are not specified by shippers. Lack of designated junction points would in some cases permit MOPAC a longer haul on some traffic because T&P and C&EI junctions with the connecting railroad would now all be MOPAC connections. Because of this, there will be more interchange points between the consolidated MOPAC and connecting railroads and more junctions via which through routes apply. On MOPAC deliveries to connecting carriers, MOPAC would have the opportunity on certain traffic to make delivery at a more distant junction increasing its revenue and decreasing the revenue of the connecting carrier. However,

on shipments delivered to MOPAC, there would be a similar opportunity for a longer haul by the connecting carrier on this same type of traffic.

Applicants assert that the revenues gained or lost from such opportunities would tend to offset each other. Furthermore, the connecting railroads and MOPAC could protect their present routings by inducing the shipper to specify junctions in the routing on the bills of lading.

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Palestine Agreement.—The Administrative Law Judge found that the laws of the State of Texas and the Palestine Agreement currently impose undue burdens and obligations on MOPAC, and that they will impose unduly burdensome, inefficient, juriously wasteful, and unnecessary obligations on the proposed unified operations and upon interstate commerce. The Administrative Law Judge further found that such restraints are contrary to the public interest and the national transportation policy, that the Commission has the authority under section 5(11) of the act to relieve MOPAC of these requirements, and that MOPAC should be relieved of its obligations thereunder.

We agree with the discussion, findings, and conclusions of the Administrative Law Judge with respect to the Palestine Agreement and its effect on the proposed merger and on interstate commerce. The Commission has on numerous occasions relieved carriers from the same Texas statutes and similar contractual obligations in proceedings under section 5. *St. Louis S. W. Ry. Co. of Texas Lease,* 290 I.C.C. 205 (1953); *Kansas City Southern Ry. Co. Merger,* 254 I.C.C. 529 (1943). The Commission's power to grant such relief consistently has been upheld. See *Texas* v. *United States,* 292 U.S. 522 (1934); *Seaboard R. Co.* v. *Daniel,* 333 U.S. 118 (1948); *Schwabacher* v. *United States,* 334 U.S. 182 (1948). Accordingly, we conclude that the arguments of the city of Palestine and county of Anderson, Tex. are without merit.

Statutory findings.—In Finance Docket No. 27773, subject to the terms, conditions, and modifications hereinbefore discussed, which we find to be just and reasonable, we find that (1) the merger of the properties and franchises of The Texas and Pacific Railroad Company and the Chicago & Eastern Illinois Railroad Company into the Missouri Pacific Railroad Company for ownership, management, and operation; (2) the acquisition by the Missouri Pacific Railroad Company through ownership of stock, of sole or joint control of companies subsidiary to or affiliated with The Texas and Pacific Railway Company and the Chicago and Eastern Illinois Railroad Company; and (3) the acquisition of indirect control by the Mississippi River Corporation; a noncarrier owner of a controlling stock interest in the Missouri Pacific Railroad Company, are just and reasonable and constitute transactions within the scope of section 5(2)(a) of the Interstate Commerce Act, and will be consistent with the public interest.

In Finance Docket No. 27774, we find that the issuance by the Missouri Pacific Railroad Company of 972,772 shares of its common stock and the assumption by the Missouri Pacific Railroad Company in respect of securities to the extent to which either The Texas and Pacific Railway Company or the Chicago and Eastern Illinois Railroad Company is liable as obligor or guarantor thereon under the terms and conditions set forth (a) are for a lawful object within its corporate purposes and compatible with the public interest, which is necessary and appropriate for and consistent with the proper performance by the Missouri Pacific Railroad Company of service to the public as a common carrier and will not impair its ability to perform such service, and (b) are reasonably necessary and appropriate for such purposes.

And we further find that the petition of the Chicago, Rock Island and Pacific Railroad Company for inclusion in the merger approved and authorized in Finance Docket No. 27773 should be denied.

We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

An appropriate order will be entered.

COMMISSIONER O'NEAL, dissenting in part:

The Palestine Agreement is a contract originally entered into in 1872 between the town and the railroad. The subsequent statutory support of that contract created by the Office Shops Act and the removal of that support by the Transportation Act of 1920 does not alter the existence and terms of the original contract. The 1954 Agreement between the city of Palestine and Anderson County, on the one hand, and the railroad, on the other, modified the earlier contract and is based on it.

The intervenors question whether this Commission has the authority under sections 5(2) and 5(11) of the Interstate Commerce Act to relieve the railroad of its contractual obligations. The Administrative Law Judge answered that question in the affirmative.

Assuming that the Commission does have authority to set aside contracts in section 5 proceedings, that authority should be used with discretion. It should be used only to abrogate agreements which, if allowed to stand, would block a section 5 transaction which would yield a significant public benefit. The Commission was granted "plenary power" in section 5 to assure that transactions which served the broad public interest would not be frustrated by local interest laws. That authority was not intended to be a means by which railroads could relieve themselves of bothersome contractual obligations through merger.

The Palestine Agreement is not an impediment to this merger. The railroad and the town entered into this contract on their own volition. Valuable consideration in the amount of $150,000 (in 1872 dollars) passed to the railroad. No term of the private agreement gives the railroad

any right to unilaterally withdraw from its obligations. And there is no overriding public policy reason for abrogating the contract, even if we make the doubtful assumption that the Commission could do so in this case. The railroad has lived with this contract for some time and could continue to do so. The carrier's arguments as to the burden of keeping the freight claims department in Palestine are irrelevant; the contract does not require that that function be kept there. The car repair shop employs the majority of the workers. The railroad admits that a car repair facility is needed in the area and states that if it is relieved of the Agreement, it will build one between Palestine and Houston. However, it has not shown why it cannot build a new facility near Palestine, if it feels the existing one to be inadequate.

This holding, if allowed to stand on the basis of these facts, sets a precedent by which the Commission allows carriers to escape their contract obligations merely on a showing that it would be to the carrier's advantage to do so. The contract in question was freely entered into, and its abrogation will greatly harm, if not devastate, the economy of Palestine, Tex. Abrogation in this case serves no public purpose, only the private purposes of the railroad. Our statutory authority in this area has its limits, and in this proceeding the Commission has exceeded those limits. Even if we were to have the authority, however, it should not be used in these circumstances.

APPENDIX

Excerpted below are certain pertinent sections of the Initial Decision of the Administrative Law Judge:

Historical Background and Nature of the Restraints From Which Applicants Seek Relief

In 1872, the Houston Great Northern Railroad Company, predecessor of the International-Great Northern, contracted with the citizens of Palestine, Texas, in Anderson County, in consideration of $150,000.00 of bonds issued by the county and delivered to the railroad company, to

maintain its general offices, machine shop and roundhouses at Palestine, Texas. In 1873, the Houston and Great Northern Railroad Company was consolidated with the International Railroad Company.

In 1875, the consolidated company, known as the International and Great Northern Railroad Company, in consideration of the erection of houses for its employees in Palestine, Texas, renewed the above contract with the City of Palestine. All of these agreements were oral, but their existence was established in subsequent litigation.

The offices and machine shops were then established at Palestine, Texas, and, with some interruptions, not material here, they were subsequently maintained there. Certain mortgages executed by the original companies were foreclosed in 1879 and the railroad property was then sold and conveyed to a new Texas corporation, still called the International and Great Northern Railroad Company, by a deed conveying all the franchises and chartered powers of the original companies. In 1881, the purchasing company executed a mortgage on its property, which was foreclosed in 1910.

Meanwhile, however, certain statutes had been enacted by the Legislature of Texas. The first, known as the "Office-Shops Act", approved March 27, 1889, Acts 1889, p. 130, G.L. Vol. 9, p. 1158, provided that every railroad company chartered by, or owning or operating any line of railroad within the state shall permanently maintain its general offices at the place in Texas named in its charter, and if no certain place was named therein, at such place where it shall have contracted or agreed to locate them; also, that it should maintain its machine shops and roundhouses at the place where it had contracted to keep them, and that the offices, shops, or roundhouses were located on the line of railroad in a county that had aided such railroad by an issue of bonds in consideration of the location being made, then such location should not be changed.

In addition, this Act required that all the general offices of the company reside and maintain their offices at the

place in Texas designated as the general offices of the railroad. It was also enacted that a violation of this Act by any railroad company of the State should cause a forfeiture of its charter and a penalty of $5,000.00 a day was prescribed for every day of violation.

As previously stated, the I&GN Railroad Company mortgage of 1881 was foreclosed in 1910 and the foreclosure decree, dated May 10, 1910, ordered a sale, which was made June 13, 1911. The purchaser was the International and Great Northern Railway Company. Based on the assumption that the above discussed Office-Shop and other laws, passed since the mortgage was made, did not affect the property after foreclosure, the purchaser filed in court a repudiation of any agreement of its predecessors to maintain offices and shops at Palestine, Texas, and so notified the officials of Anderson County in the City of Palestine, Texas. The Articles of Incorporation of the purchaser fixed the place for the general offices at Houston, Texas.

Anderson County, the City of Palestine, and certain citizens then brought suit in the Texas District Court against the successor, I&GN Railway Company, asking for a decree "enforcing the public duty of defendant to forever keep and maintain its general offices, machine shops, and roundhouses in the City of Palestine," and for an injunction against its maintaining any other general offices in connection with the operation of the railroad at any other location in violation of the laws of the State. In 1914, the District Court entered its decree in favor of the plaintiffs, which enjoined I&GN • • •

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The Defendant railroad then appealed to the Court of Civil Appeals of Texas, which affirmed the Judgment, *International & G.N. Ry. Co.* v. *Anderson County*, 174 S.W. 305 (Tex. Civ. App. Texarkana 1915) writ ref. The case was appealed to the Supreme Court of the United States which, in 1918, affirmed the Judgment against the railroads. *International & G.N. R. Co.* v. *Anderson County*, 246 U.S. 424, 62 L. Ed. 807 (1918). In its opinion the

Supreme Court does not specifically state whether a contract or statute was being enforced. However, it would appear from the language used that the existence of the statute prevented foreclosure from eliminating the obligation. Speaking for the court, Mr. Justice Holmes states: "But the foreclosure did not have the supposed effect. They no more removed all human restrictions than they excluded the authority of ordinary course. Suppose that a special act incorporating the mortgagor had provided in terms evidently intended to reach beyond the foreclosure that the general offices were to remain forever at Palestine—it hardly would be argued, and certainly would not be argued here or in Texas with success, that the requirement could be touched by a decree. But if the law made that requirement, it hardly matters whether the restriction was imposed by charter or otherwise, or whether the remote reason for it was a contract or a general motion of public policy. State courts hold that when the law on any ground fixes a place on the offices and shops, the obligation is indelible by foreclosure. We see no reason why their decision should not prevail." *International & G.N. R. Co., supra,* 431-432.

Any doubt that might be raised regarding this issue is about erased when viewing this language in the perspective of the Texas Appellate Court's opinion which was being reviewed. *International & G.N. Ry. Co.* v. *Anderson County, supra,* 316, the Texas Court of Civil Appeals emphasized that:

"The defense of appellant and the right of appellees were entirely dependent upon whether a statutory provision of the state in respect to charter rights of appellant in location of its domicile was applicatory. The decree was entirely dependent upon the statute, and not the enforcement of a private contract as such, for its validity. The contract was only evidence in the line of facts going to prove the application of the statute, and did not operate or have the legal effect to create a lien in rem, or any other legal liability or claim in favor of the appellees."

Thus, there is little doubt but that both the Texas Appellate Court and the United States Supreme Court in 1915, and 1918, respectively, considered that the state statute only prevented the removal of the railroad general offices from Palestine, Texas.

About 10 years later the New Orleans, Texas & Mexico Railway Company acquired control of I-GN and MoPac acquired control of New Orleans, Texas & Mexico Railway Company. *Control of International-Great Northern R.R. By New Orleans, Texas & Mexico Ry.*, 90 I.C.C. 262; *Control of Gulf Coast Lines by Missouri Pacific R.R.*, 94 I.C.C. 191. Representatives of the City of Palestine and County appeared in both proceedings to request conditions requiring compliance by MoPac with the 1914 Judgment and the Office-Shops Contract (i.e., requiring that the general offices, machine shops and roundhouses of I-GN be maintained in Palestine), but this Commission found such conditions unnecessary saying:

"The President of the Applicant testified that if the application be authorized his company would assume every contract or obligation binding upon the International Company. It is not shown and does not appear how a change of the controlling stock interest could relieve the International Company from any legal obligation." 90 I.C.C. 262, 266.

In *Control of Gulf Coast Lines, supra,* the Commission observed that "it is stated that the validity of this contract has been sustained by the United States Supreme Court. We are of the opinion that questions which relate to the enforcement of judgments of the Courts should properly [illegible] to those tribunals." 94 I.C.C. 191, 198.

[illegible]929, the Commission was requested to approve a [illegible]ding under Section 5(2) of the Interstate Com[illegible]e Act authorizing MoPac to lease and operate the properties of the I&GN and other controlled lines. *Missouri Pac. R. Co. Unification,* 166 ICC 154 (1930). At that time relief from the obligation to maintain general offices, machine shops and roundhouses at Palestine, Texas was

requested, but the Commission felt that it had no jurisdiction to grant the requested relief. The Commission apparently took the position that state laws and state created obligations imposed on interstate carriers could only be set aside if the laws and obligations conflicted with Federal laws.

Thus, the Commission in 1930 felt itself without jurisdiction to relieve the MoPac of the conditions that now form the Palestine Agreement. See also *Missouri Pac. R. Co., Unification,* 175 ICC 26 (1931). Applicants contend that the Commission does have such jurisdiction and power by virtue of the National Transportation Act of 1920 and the subsequent 1940 Amendments conferring "exclusive and plenary" power on the Commission in Section 5 transactions.

After 1931, the situation remained unchanged until the years of bankruptcy, commencing in 1933, and the I&GN complied with the statutory obligation to maintain its general offices, machine shops and roundhouses in Palestine, Texas. A plan of reorganization was proposed, and a decision was reached to incorporate the I&GN separately, and thus avoid the possibility that the general offices of the reorganized system be located at Palestine, Texas. A recent amendment to the Bankruptcy Act, Section 77(n), appeared to make that result a real possibility. However, the need for such a separate incorporation of the I&GN under the plan of reorganization became unnecessary because an agreement was reached with the City of Palestine and Anderson County resulting in a modification of the original 1914 court decree. By this modification decree, dated March 2, 1955, the consolidated company was obligated to maintain a certain number of employees, and percentage of annual payroll in Palestine. Thus, this agreement attempted to eliminate the general office and shop maintenance requirement and the requirement that certain officials be located in Palestine, Texas. Basically the agreement calls for a specified percentage of total system shop and office employees to be located in Palestine, Texas. • • •

By order entered December 29, 1954, the United States District Court, in St. Louis, granted authority to the Bankruptcy Trustee to execute the Agreement, and went on to order:

"• • • That upon such proposed new Judgment being entered in the District Court of Cherokee County, Texas, if it is so entered, superseding the 1914 Judgment of that court, Guy A. Thompson, as Trustee, International-Great Northern Railway Company, Debtor, the reorganization managers of the Debtor, International-Great Northern Railway Company, and the debtor company, are all successors in interest, be and they are bound thereby, in that they be and hereby are authorized and directed jointly and severally to carry out the terms and conditions of the aforesaid contract and the decree or judgment entered in conformance therewith."

The 1954 Agreement or what is now known as The "Palestine Agreement," was executed on behalf of the city, by its Mayor pursuant to an Ordinance of the City Council, and on behalf of Anderson County by its County Judge, pursuant to an Order of the Commissioners' Court; and on behalf of the Railroad, by its Trustee, pursuant, as noted above, to an order of the United States District Court in the reorganization proceedings dated December 29, 1954 specifically authorizing and approving such new Agreement.

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Pursuant thereto, a hearing was held before the State District Court in February 1955 to so modify the 1914 Judgment, and certain citizens of Palestine and Anderson County intervened in opposition to approval of the new Agreement on the ground that Palestine and the County were unnecessarily surrendering valuable rights under the old Office-Shops Contract and the 1914 Judgment, asserting that the Railroad was not in good faith complying with that Contract and Judgment, and that such Contract and Judgment should be enforced against it.

At that hearing MoPac's then Chief Executive testified that the Railroad and its Trustee were seeking a way to

modernize the old I-GN Contract in such terms that "forever and thereafter we could always live in peace and harmony with Palestine"; that the Railroad and its Trustee concluded that the best yard stick to work with in the future would be to use a stated percentage of the type of employees covered by the 1914 Judgment so that regardless of future combinations or consolidations the number of employees to be at Palestine could be determined. MoPac's Chief Executive testified that he considered the Railroad has a "moral duty to see that Palestine did not suffer if there was any practical way to do it without costing the Railroad a charge of inefficiency"; that he felt obligated to give Palestine "the economic equivalent of what they had or considered they had" under the I-GN Contract; that as far as the Railroad was concerned, he considered the 1954 Agreement a permanent settlement of the controversy between the Railroad and the City and County; that it was inconceivable to him that the Interstate Commerce Commission would re-open the question of burden on interstate commerce when both contracting parties had agreed that it was not; and that after the system is consolidated "we feel that we can always find sufficient work to do in Palestine and personnel to keep there, we don't think that there will be any trouble about maintaining that percentage. We are willing to take that on that obligation."

Since the 1955 decree was entered, the agreement has remained unchanged until the present time. The statutory requirements enacted in 1889 have also been carried forward to the present day by subsequent revised statutes as set forth previously.

At the present time, MoPac has its freight claims department, a diesel service facility and a freight car repair shop located in Palestine. There are approximately 64 employees in the freight claims department, 222 in the car repair shop, and 86 other employees (such as yardmasters, switch tenders, hostlers and others, coming within ICC Employee Classifications I, II, IV, V and VI(a) (which are the ones included within the 1954 Agreement)

located at Palestine. There are 294 other employees (such as engineers, trainmen, section and maintenance of way employees) presently employed at Palestine whose jobs fall within other ICC Employee Classifications which are not covered by the 1954 Agreement.

The freight claims department was moved voluntarily by MoPac to Palestine in 1955. In 1959 or 1960 the T&P freight claims department was also moved to Palestine and this department handles freight claims for both MoPac and T&P. If MoPac is relieved of the obligations of the 1954 Agreement, then it wants to move this department and its 64 employees to St. Louis. Yet there is nothing in the 1954 Agreement which prevents such removal. Of these 64 freight claims department employees, 13 positions now at Palestine and two in St. Louis could be eliminated and these employees would be assigned other work. Employees with less seniority would lose their jobs.

MoPac apparently has no immediate plan to eliminate the car repair shops at Palestine and offered no testimony to show any monetary savings to be effected thereby. The shop is "outmoded" and has become "poorly tooled and obsolete" in that "other shops • • • are far more efficient." MoPac concedes that there is a need for such a shop facility in Texas and that it would like to construct such a new shop which would be modern in track layout, buildings and tooling. Apparently MoPac has been trying to secure options on land South of Palestine and North of Houston for that purpose. Of the 615 Missouri Pacific and 543 T&P Mechanical Department employees located within Texas, 209 (18%) are now located in Palestine; that "relocation to a new shop would still leave some 40 mechanical people (3.5%) in Palestine" and that "the remaining 80% of the force (the other 169 now at Palestine) would have the opportunity to follow the work to the new shop location". The record also indicates that "there will always be some repair work (done at Palestine) because of the geography of • • • the railroad." A witness testified that the shop facilities at Palestine

are worth "a number of millions of dollars" and that there is no physical impediment to locating this shop elsewhere in Palestine or in the general area of Palestine.

The City of Palestine is located in the Eastern part of Texas on the Missouri Pacific's main line between St. Louis, Missouri and Laredo, Texas, and is the juncture point for its main line to Houston. According to the Federal Census, its 1950 population was 12,503, and its 1970 population was 14,525. According to the 1974 *Texas Almanac,* Palestine's estimated population as of April 1, 1973 was 15,600, with employment of 4,767, annual wages of $26,212,816, and total annual income of $69,305,000.

Exhibit 11 shows that for the month of February, 1975, the Missouri Pacific was required by the 1954 Agreement to employ 353 employees at Palestine, but actually employed 372 Agreement-related employees there, whose monthly compensation average $907.84 each. It had Agreement-required employee compensation for that month of $348,467.48 and actual employee compensation of $337,-716.74. Thus, assuming the same total employment and wages in February, 1975, as at April 1, 1973, the Missouri Pacific's employees under the 1954 Agreement represent approximately 8% of the total number of employed persons in Palestine, and the wages it paid them, approximately 15.5% of the total wages paid in Palestine. If all 64 of the Missouri Pacific's freight claims department's employees, and all but 40 of the mechanical department's employees, should be moved out, the annual loss in wages paid in Palestine (based on Exhibit 11) would be approximately $3,617,000. This is the impact on the economy which the City of Palestine is concerned.

It long has been established that this Commission has the authority to relieve the Applicants of all restraints, limitations, and prohibitions of law insofar as may be necessary to enable them to put into effect the proposed merger consistent with the public interest and the national transportation policy. *Seaboard Airline R. Co.* v. *Daniel,* 333 U.S. 118, 92 L. Ed. 581 (1948); *Texas* v. *United States,*

292 U.S. 522, 78 L. Ed. 1402 (1934); *Schwabacher* v. *United States*, 334 U.S. 182, 92 L. Ed. 1305 (1948).

The legislative history of the Transportation Act of 1920, is described by the Supreme Court in *Schwabacher* v. *United States*, *supra*, as

"The demand for an integrated, efficient and coordinated system of rail transport, equal to the needs of our national economy and defense, resulted in the Transportation Act of 1920. In a series of decisions on particular problems, this Court defined the general purposes of that Act to be the establishment of a new federal railway policy to insure adequate transportation service by means of securing a fair return on capital devoted to the service, restoration of impaired railroad credit, and regulation of rates, security issues, consolidations and mergers in the interest of the public. The tenor of all of these was to confirm the power and duty of the Interstate Commerce Commission, regardless of state law, to control rate and capital structures, physical make-up and relations between carriers, in the light of the public interest in an efficient national transportation system." (334 U.S. 191-192).

Among the powers and duties granted to this Commission is the "exclusive and plenary" authority to approve mergers between carriers, upon such terms and conditions as the Commission "shall find to be just and reasonable" and "consistent with the public interest." When such a merger is approved, the carriers involved "are relieved" from the operation of all "restraints, limitations and prohibitions of law insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission." 49 U.S.C.A. §§5(2), 5(11). The Commission has on numerous occasions relieved carriers from the same statutes which Applicants seek relief from and similar contractual obligations in Section 5 transactions. *St. Louis S.W. Ry. Co. of Texas Lease*, 290 ICC 205 (1953); *Kansas City Southern Ry. Co. Merger*, 254 ICC 529 (1943).

This action has been consistently upheld by the courts. In the leading case of *Texas* v. *United States, supra*, the United States Supreme Court unanimously held that, in approving a lease between railroads under 49 U.S.C.A., the Commission had the power to relieve the Applicants from the restraints of the same statutes which Applicants seek relief from. The statute which was held to have been superseded by ICC order in *Texas* v. *United States, supra* was Article 6275, Texas Revised Civil Statutes, 1925, which, in its prior codification provided the basis for the injunction entered against the I&GN in 1914 and the statute which also provided the basis for the subsequent 1955 Agreement with the City of Palestine, Texas.

Noting the requirement of the Transportation Act that railroad leases be approved upon conditions which will promote the public interest, the Supreme Court observed that the Commission had found the requirement to maintain general offices at a specific location in Texas as inconsistent with the purpose of the Transportation Act of 1920.

"* * * We found that Transportation Act, 1920, introduced into the federal legislation a new railroad policy, seeking to insure an adequate transportation service. To attain that end, new rights, new obligations, new machinery, were created. *Railroad Commission of Wisconsin* v. *Chicago, B.&Q.R. Co.*, 257 U.S. 563, 585; *New England Divisions Case*, 261 U.S. 184, 189, 190; *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U.S. 456, 478. It is a primary aim of that policy to secure the avoidance of waste. That avoidance, as well as the maintenance of service, is viewed as a direct concern of the public. *Davis* v. *Farmers Co-operative Co.*, 262 U.S. 312, 317; *Texas & Pacific Ry. Co.* v. *Gulf, C.&S.F. Ry. Co.*, 270 U.S. 2666, 277. The authority given to the Commission to authorize consolidations, purchases, leases, operating contracts, and acquisition of control, was given in aid of that policy. *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, 24, 25. The criterion to be applied by the Commission in the exercise of its authority to approve such transactions—a criterion

reaffirmed by the amendments of Emergency Railroad Transportation Act, 1933, is that of the controlling public interest. And that term as used in the statute is not a mere general reference to public welfare, but, as shown by the context and purpose of the Act, 'has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities'. *New York Central Securities Corp.* v. *United States, supra.*

It is in the light of this criterion that we must consider the scope of the Commission's authority in relation to provisions which are intended to relieve interstate carriers from burdensome outlays. The fact that burdensome expenditures may be required by state regulations is not a barrier to their removal by dominant federal authority in the protection of interest commerce. As we said in *Colorado* v. *United States,* 271 U.S. 153, 163: 'Prejudice to interstate commerce may be effected in many ways. One way is by excessive expenditures from the common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce.' Even explicit charter provisions must yield to the paramount regulatory power of the Congress. *New York* v. *United States,* 257 U.S. 591, 601. Obligations assumed by the corporation under its charter of providing intrastate service are subordinate to the performance by it of its federal duty, also assumed, 'efficiently to render transportation services in interstate commerce.' *Colorado* v. *United States, supra,* p. 165. See *Transit Commission* v. *United States,* 284 U.S. 360, 367, 368; *Transit Commission* v. *United States,* 289 U.S. 121, 127; *Florida* v. *United States,* ante, p. 1. In the present case, the findings of the Commission, setting forth undisputed facts, leave no doubt that the provision of the lease permitting the abandonment, or removal from the State, of general offices and shops of the lessor has direct relation to economy and efficiency in interstate operations and to the achievement of the purpose which the Congress had in view in its grant of authority." (292 U.S. 530-532).

Texas v. *United States,* of course, was decided before the Transportation Act was amended, in 1940, to include the provision granting the I.C.C. "exclusive and plenary" authority in approving leases and other acquisitions. Thus, the Commission's power in this respect is even broader, than it was at the time *Texas* v. *United States* was decided.

This point was made in 1948 in *Seaboard Air Line Railroad Co.* v. *Daniel, supra.* There, this Commission, pursuant to a reorganization under 49 U.S.C.A. §5, approved the application of a Virginia railroad to operate in South Carolina. The constitution and statutes of South Carolina provided that railroad lines within that state could be owned and operated only by South Carolina corporations, so the I.C.C. affirmatively authorized a Virginia railroad to operate the railway system "without complying with the South Carolina railroad corporation laws." It was urged that the Transportation Act should not be construed to authorize the I.C.C. so to override state enactments. The Supreme Court upheld the I.C.C., however, and said:

"Congress has long made the maintenance and development of an economical and efficient railroad system a matter of primary national concern. Its legislation must be read with this purpose in mind. In keeping with this purpose Congress has often recognized that the nation's railroads should have sound corporate and financial structures and has taken appropriate steps to this end. The purchase of this very railroad by appellant resulted from extensive reorganization proceedings conducted by the Interstate Commerce Commission and federal district courts in accordance with congressional enactments applicable to railroads. In furtherance of this congressional policy these agencies approved reorganizational plans which called for the purchase and operation of these properties, including the portion in South Carolina, by appellant, as a Virginia corporation.

This Court has previously approved a Commission order entered in a §5 consolidation proceeding which granted

a railroad relief from state laws analogous to the state requirements here. *Texas* v. *United States,* 292 U.S. 522 (1934). Most of the reasons which justified the Commission's order in that case are equally applicable here. Furthermore, since that case was decided Congress has given additional proof of its purpose to grant adequate power to the Commission to override state laws which may interfere with efficient and economical railroad operation. By §5(11) of the Interstate Commerce Act, as amended by the Transportation Act of 1940, 54 Stat. 908, 49. U.S.C. §5(11), Congress granted the Commission 'exclusive and plenary' authority in refusing or approving railroad consolidations, mergers, acquisitions, etc. The breadth of this grant of power can be understood only by reference to §5(2)(b) which authorizes the Commission to condition its approval upon 'such terms and conditions and such modifications as shall find to be just and reasonable.'" (333 U.S. 124-126)

Clearly, then, this Commission has the power to grant applicants' relief as part of the Commission's "exclusive and plenary" authority to approve mergers upon "such terms and conditions and such modifications as it shall find to be just and reasonable" and "consistent with the public interest."

The City of Palestine and the County of Anderson argue that the 1955 Agreement is a purely contractual obligation between the parties despite the fact that the court decree upon which the Agreement is predicated is based upon the state statutes requiring the maintenance of certain offices and personnel in Texas. However, assuming for the sake of argument that the "Palestine Agreement" is a purely contractual obligation, the Commission nevertheless has the power under 49 U.S.C.A. §5(2), 5(11), to relieve Applicants of the contractual obligations resulting from the "Palestine Agreement" by virtue of state law when the Commission finds it in the public interest to do so. In fact, the Commission has previously relieved other carriers from similar contractual obligations. In *St. Louis S.W. Ry. Co. of Texas Lease, supra,* the Commission re-

lieved the Applicant of its contractual obligation with the City of Tyler, Texas, to perpetually maintain in Tyler its machine shops and general offices. In holding that the Applicant was relieved from the operation of state law and the burdensome "Tyler Agreement," the Commission stated: "The record is clear that it would be imprudent for the applicant to lease the properties of the Texas company if the effect would be to subject the entire system operations to the requirements of Texas laws and thus prevent it from carrying on its business and locating its offices in a manner most consistent with operating economy efficiency. Compliance with the State and Municipal laws and contracts as shown herein would hinder economy and efficiency in operation and service to the public and thereby impose an undue burden upon interstate commerce."

Thereafter, in the early part of 1966, the St. Louis Southwestern Railway Company filed a motion in the District Court of Smith County, Texas, to vacate, modify or suspend an injunction entered in 1906, enforcing the "Tyler Agreement" which had enjoined and restrained the "• • • St. Louis Southwestern Railway Company of Texas from removing its General Office from said City of Tyler • • •" *City of Tyler* v. *St. Louis Southwestern Ry. Co. of Texas,* 99 Texas 491, 91 S.W. 1 (Tex. Sup. 1906).

The railroad appealed the trial court's decision to the Court of Civil Appeals which held that the "• • • Interstate Commerce Commission has the power under the Transportation Act of 1920 and Amendments thereto to relieve railroads from the operation of private contracts if it deems such action to be in the public interest." *S. Louis Southwestern Ry. Co. of Texas* v. *City of Tyler,* 422 S.W. 2d. 780 (Tex. Civ. App., Eastland, 1967) writ ref. n.r.e. The City appealed the decision to the Texas Supreme Court by writ of error, but the Supreme Court denied with writ, and found no reversible error in the Appellate Court decision. See also *Texas* v. *United States, supra* and *Schwabacher* v. *United States, supra,* where the Supreme Court upheld the Commission's power to set aside contractual obligations imposed on the carriers by their respective charters.

With regard to the public interest, Section 5(2)(b) of the Act provides, that:

"If the Commission finds that • • • the proposed transaction • • • will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions • • • found to be just and reasonable."

In *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, 25, 77 L.Ed. 138 (1932); the Supreme Court said:

"The term 'public interest' • • • has a direct relation to the adequacy of our transportation system, to its essential conditions of economy and efficiency and to appropriate provision and best use of transportation facilities."

The Commission has long been mindful of the policy behind Section 5 proceedings as reflected in this statement from *Seaboard Air Line R. Co.-Merger-Atlantic Coast Line*, 320 ICC 122, 206 (1963).

"(T)he purpose of Section 5 is to facilitate mergers • • • that are voluntarily entered into by the carriers themselves and have as their principal objectives the elimination of wasteful transport and the fuller utilization of the merging railroad potential for the rendition of efficient and economic service."

Applicants argue that it would be imprudent for them to effect the proposed merger if the entire system were to be subjected to the requirements of Texas law and other contractual obligations as set forth herein. The Administrative Law Judge agrees. For those requirements or restrictions would prevent Applicants from carrying on their business and locating offices and facilities in a manner most consistent with operating economy and efficiency. The continued maintenance of a separate corporate existence of a Texas company as required by Article 6260, V.A.T.S. with separate books, and a separate board of directors and officers, in compliance with Article 6281, 6282, and 6283, V.A.T.S. would defeat the purpose of the

application. If MoPac is not relieved from the operation of Article 6275, 6276, 6277 and 6278, V.A.T.S., requiring all railroads operating in the State of Texas to maintain general offices in Texas and specifically required named officers from the President of the company to the general claim agent to be located at said general office, MoPac, in legal contemplation, could be faced with the prospect of moving its entire base of operations and general offices from St. Louis, Missouri to Texas. The expenditures relating to such a movement, assuming that adequate facilities could be located in Texas, would be substantial. This movement would also require the relocation or replacement of hundreds of employees who are presently employed at the general offices of MoPac in St. Louis, Missouri.

To comply with Article 6281, V.A.T.S., requiring that the principal business of the railroad be conducted and claims for damages settled or adjusted in Texas would also appear to require large expenditures for the movement of the General Claims Department, excluding freight claims, from Missouri to Texas. Furthermore, compliance with Article 6277 and 6280 requiring the maintenance of machine shops, roundhouses, and requiring all repair work on equipment operating in Texas to be performed in Texas would be wastefully expensive, as well as prohibit MoPac from making repairs and maintaining its equipment at facilities presently located elsewhere, such as Little Rock, Arkansas and DeSoto and Sedalia, Missouri. In this regard, this record shows that approximately 70% of MoPac's total system-miles are located outside the State of Texas, but pursuant to the above statutes, MoPac could conceivably be required to maintain and repair all its equipment in the State of Texas. That is the reason why applicants feel that these requirements and the resulting expenditures are wholly unnecessary, burdensome, and inconsistent with the public interest. The Administrative Law Judge agrees.

Applicants also are seeking relief from the "Palestine Agreement" which is merely an extension of the Texas statutes originally enacted in 1889, and recodified as here-

inafter set forth herein and enforced by Judicial Decree in 1914. Among other obligations, as noted earlier, the Palestine Agreement requires that a specified percentage of the average number of office and shop employees of the MoPac be employed at Palestine, Texas. This obligation on its face requires MoPac to station several hundred employees at Palestine, Texas, despite the fact that they possibly could be used more efficiently at other locations as the need for transportation service would dictate. This agreement restricts managerial discretion as to where to locate various operations and employees in the most efficient and economic way as public services requirements fluctuate on MoPac's system. Such restrictions, so applicants argue, are clearly contrary to sound business policy and inconsistent with MoPac's duty to provide an economic and efficient transportation system to the public which is responsive to changed conditions and traffic flow. The Administrative Law Judge agrees.

For example, at the present time MoPac has the Freight Claims Section of the Accounting Department located in the City of Palestine, Texas, to partially satisfy its obligation under the agreement. This department was formerly located in St. Louis, Missouri, and transferred to Palestine, Texas in 1960. Today, there are 64 employees who make up the Freight Claims Section who are stationed at Palestine, Texas. This results in a situation where the Freight Claims Section is 664 miles away from MoPac's general offices, and located in a rather remote area of the State of Texas. The inefficiencies and added expenditures which occur by virtue of the Freight Claims Section being located in Palestine, Texas, are brought about mainly by the fact that all records relating to the shipments and movements of freight are located at the MoPac's general offices in St. Louis, Missouri, where there are adequate storage facilities. This means that whenever there is a freight claim, the records have to be located and shipped from St. Louis, Missouri, to Palestine, Texas, before the claim can be processed. This causes delays of several days in the processing of the public's claims and results in in-

efficient handling of these claims. If MoPac were relieved of the burdensome obligation to station several hundred employees in Palestine, Texas, the Accounting Department alone could eliminate 31,320 unneeded man hours, or, have the equivalent of a reduction of 15 employees in the Freight Claims Section. This could be brought about by moving the Freight Claims Section to St. Louis, Missouri, where all records are maintained and where the Freight Claims Section would have access to MoPac's computer operations and in addition, have the availability of MoPac's legal staff who could help expedite decisions on technical and legal matters related to the handling of claims. The savings that would be realized by movement of the Freight Claims Section to St. Louis, Missouri alone amount to approximately $240,238.00 per year plus result in the more efficient handling of the public's freight claims.

In addition to the Freight Claims Section being located at Palestine, Texas, there were, as of March 1, 1975, 209 employees from MoPac's Mechanical Department stationed at Palestine, Texas. These employees are also stationed at Palestine, Texas to satisfy MoPac's obligations under the agreement and thus constitute the major percentage of the total number of employees required to be stationed at Palestine, Texas. The Mechanical Department force of 209 men at Palestine, Texas, constitutes 18% of the total mechanical forces in Texas. However, despite the large number of the Mechanical Department employees stationed at Palestine, Texas, the shop facilities there are congested, poorly tooled and obsolete. These forces could be better and more efficiently utilized at other locations more suitable as service location for MoPac's system. However, under the terms of the agreement, MoPac is required to maintain a certain number of employees at Palestine, Texas, and is unable to relocate these employees without replacing them with other employees.

This record shows that MoPac is considering building a major shop facility at some other location in Texas more suited by geography and topography to meet MoPac's future needs, but, the Palestine Agreement prevents the

construction of such a facility because the agreement arbitrarily requires that a certain percentage of MoPac's employees be stationed at Palestine, Texas. New shop facilities could not practically be built in Palestine, Texas because of the physical constraints of the surrounding town. In addition, the general topography in the area surrounding Palestine, Texas, is not conducive for locating a major yard or major repair facility.

This record clearly establishes that through this merger proceeding applicants are seeking to establish an efficient unified rail system responsive to the public's need for adequate transportation service. Consistent therewith the Administrative Law Judge concludes that applicants should be relieved from the laws of Texas as set forth herein, the 1955 Agreement with the City of Palestine, the County of Anderson, and certain citizens named therein and, any obligations arising out of the 1914 Judicial Decree affirmed in *International & G.N. Ry. Co.* v. *Anderson County,* 174 S.W. 305 (Tex. Civ. App., Texarkana 1915) writ ref., pertaining to the establishment of machine shops and general offices in Palestine, Texas. For those requirements have no necessary relation to economy and efficiency in operation or service, are contrary to the public interest and the National Transportation policy, and would hinder Applicants' unified operation and service and thereby impose an undue burden upon the proposed unified operations and upon interstate commerce.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 4th day of May 1976.

Finance Docket No. 27773

MISSOURI PACIFIC RAILROAD COMPANY—MERGER—THE TEXAS AND PACIFIC RAILWAY COMPANY AND CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY

Finance Docket No. 27774

MISSOURI PACIFIC RAILROAD COMPANY—SECURITIES

Investigation of the matters and things involved in these proceedings having been made, and the said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report together with the initial decision of the Administrative Law Judge is made a part hereof:

It is ordered, That the requests for oral argument be, and they are hereby, denied.

It is further ordered, That, in Finance Docket No. 27773, subject to the terms, conditions, and modifications referred to in the accompanying report, (1) the merger of the properties and franchises of The Texas and Pacific Railway Company and the Chicago & Eastern Illinois Railroad Company into the Missouri Pacific Railroad Company for ownership, management, and operation; (2) the acquisition by the Missouri Pacific Railroad Company of sole or joint control of companies subsidiary to and affiliated with The Texas and Pacific Railway Company and the Chicago & Eastern Illinois Railroad Company; and (3) the acquisition of indirect control by the Mississippi River Corporation, a noncarrier owner of a controlling stock interest in Missouri Pacific Railroad Company, be, and they are hereby, approved and authorized.

It is further ordered, That, in Finance Docket No. 27774, (1) the issuance by the Missouri Pacific Railroad Company of an amount not exceeding more than 972,772 shares of its common stock in exchange for the outstanding common stock of The Texas and Pacific Railway Company and the Chicago & Eastern Illinois Railroad Company and (2) the assumption by the Missouri Pacific Railroad Company of all obligations and liabilities of The Texas and Pacific Railway Company and the Chicago & Eastern Illinois Railroad Company in respect of securities issued by those carriers pursuant to authorizations under section 20a of the Interstate Commerce Act, be, and they are hereby, approved and authorized.

It is further ordered, That the petition for inclusion in the transaction approved herein filed by the Chicago, Rock Island and Pacific Railroad Company and the request for reopening contained therein be, and they are hereby, denied.

It is further ordered, That if the authority herein is exercised, the Missouri Pacific Railroad Company shall submit for the consideration and approval of the Commission, three copies of the journal entries required to record the transactions authorized herein.

It is further ordered, That, except as herein authorized, said stock shall not be sold, pledged, repledged, or otherwise disposed of or assumed by the Missouri Pacific Railroad Company unless or until so ordered or approved by this Commission.

It is further ordered, That nothing herein shall be construed to imply any guaranty or obligation as to said securities or dividends thereon on the part of the United States.

It is further ordered, That the Missouri Pacific Railroad Company shall report concerning the matters involved in conformity with the order of the Commission, Division 3, dated May 20, 1964, as amended, respecting applications filed under section 20a of the Interstate Commerce Act (49 CFR 1115.6).

It is further ordered, That jurisdiction is expressly reserved by this Commission to receive such petitions, institute such investigations, and issue such orders to accomplish the objectives and purposes of the conditions prescribed herein, and this reservation of jurisdiction is in addition to those orders which may be issued under the provisions of section 5(10) of the Interstate Commerce Act which are deemed necessary or appropriate to supplement this order.

It is further ordered, That this order shall be effective from and after 35 days from date of service.

And it is further ordered, That if the authority granted herein is not exercised within 1 year from the effective date hereof, or such further time as may be fixed by the Commission, it shall be of no further force and effect.

By the Commission.

ROBERT L. OSWALD,
Secretary.

(SEAL)

Supreme Court, U. S.
FILED
MAR 15 1978
MICHAEL RODAK, JR., CLERK

No. 77-870

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,

v.

CITY OF PALESTINE, TEXAS,
ANDERSON COUNTY, TEXAS, ET AL.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To The Supreme Court Of The United States:

PREFACE

This case involves the attempt of Missouri Pacific Railroad Company ("Missouri Pacific"), to rid itself of a written contract dated December 21, 1954, the obligations of which were expressly assumed by Missouri Pacific, and which its then wholly-owned subsidiary, International-Great Northern Railroad Company ("I-GN"), voluntarily made with the City of Palestine, Texas, Anderson County, Texas, and certain citizens, acting as representatives of a class composed of all of the citizens of such City and

County. Such contract is copied in full in the Appendix to this Brief.

The procedure chosen by the Railroad to abrogate this contract was to file an application with the Interstate Commerce Commission ("ICC"), to have that body approve a merger agreement dated July 29, 1974, which the parent, Missouri Pacific, had made with its controlled subsidiaries, The Texas and Pacific Railroad Company and Chicago & Eastern Illinois Railroad Company, providing, in effect, that upon the merger of these subsidiaries into the parent, the parent would no longer be bound by its 1954 Agreement with the City and County. Excerpts from such application to the ICC are also set out in the Appendix to this Brief.

The merger, as such, was unopposed before the Commission. Respondents intervened to oppose abrogation of the contract and their position was supported by the State of Texas and by the Railway Employees' Department, AFL-CIO. Such agency and other labor groups also sought labor protective conditions in the merger order more favorable than those proposed by the Railroad. The only other active participant in the proceeding was the Chicago, Rock Island and Pacific Railroad Co., appearing through its bankruptcy Trustee, which sought inclusion in the merger or indemnification for losses, which it alleged would be sustained, if not included.

The Railroad's application to the Commission stated that "MoPac has had direct control of T&P for over half a century"; that "Both T&P and C&EI are operated, and have been for some time, as a part of an integrated Missouri Pacific System". At the hearing, Missouri Pacific's president testified that by 1964 the coordination of all departments of the three railroads was completed, that each

department operates "today as a single cohesive unit", and that the purpose of the merger was to accomplish the "formal amalgamation" of that which had been true *de facto* for a number of years. Further, the application to the Commission stated that the decision to merge was the act of Missouri Pacific and its stockholders, that the three railroads were not independent lines, but were controlled by Mississippi River Corporation, and that the "contract" to merge was not "an arms length transaction".

We think the Court should further note that Exhibit 9 to the application showed that Missouri Pacific had not been in or near an operating loss position for any year of the period reported (1969 through the first eight months of 1974); that Missouri Pacific's net income for 1973 was in excess of $21,500,000, for the first eight months of 1974, in excess of $32,500,000; that it paid its stockholders dividends of $10,123,170 in 1973, and $9,539,166 in 1974; and that, on a consolidated basis for January 1 through August 31, 1974, after giving effect to the merger, the net income for such eight months would have been $40,775,043. Operations under the Palestine Agreement have thus been profitable to Missouri Pacific, and the extra cost,[1] if any, in not allowing the railroad to abrogate its contract with Palestine *means only a slight reduction in the net profits available for paying dividends.*

Notwithstanding these facts, the ICC held that it had the power to, and purported to, nullify the contract with Pales-

[1] There was no evidence or finding of *any* extra cost other than the claimed saving of $240,000 by transferring 64 freight claims employees from Palestine to St. Louis. The testimony showed that additional shop facilities were contemplated in the area between Palestine and Houston, Texas. When the railroad enlarges its shop facilities in the Palestine area it will, no doubt, need additional shop employees equal to or in excess of the 64 freight claims jobs it wants to move out of Palestine. This is the way the agreement was intended to work for the railroad.

tine as requested by Missouri Pacific, but such decision was not unanimous. Commissioner O'Neal filed a dissenting opinion, stating:

> "The Palestine Agreement is not an impediment to this merger. *** And there is no overriding public policy, reason for abrogating the contract, even if we make the doubtful assumption that the Commission could do so in this case.
>
> • • •
>
> "This holding, if allowed to stand on the basis of these facts, sets a precedent by which the Commission allows carriers to escape their contract obligations merely on a showing that it would be to the carrier's advantage to do so. The contract in question was freely entered into, and its abrogation will greatly harm, if not devastate, the economy of Palestine, Tex. Abrogation in this case serves no public purpose, only the private purposes of the railroad. Our statutory authority in this area has its limits, and in this proceeding the Commission has exceeded those limits. Even if we were to have the authority, however, it should not be used in these circumstances."
>
> See App. 33-34 to the Petition

In its application to the Commission, the Missouri Pacific asked to be relieved from any of the obligations imposed on it by various railroad statutes of Texas, all of which are discussed in detail in the Initial Decision of the Administrative Law Judge which was adopted by the Commission. Such Initial Decision gave equal billing to these statutes and the 1954 Palestine Agreement, which such Judge concluded was but an "extension" of these statutes and a "restraint of law" within the meaning of Section 5(11) of the Interstate Commerce Act. Missouri Pacific's Petition still speaks of these "state law restraints",

and, of necessity, must do so since the cases it relies upon are cases where state laws and constitutional provisions were involved and not contractual obligations voluntarily assumed.

Let it be clearly understood that neither Respondents nor any other party to the proceeding offered any objection whatever to Missouri Pacific's request that it be relieved from any of the obligations imposed by the Texas Railroad Statutes. As is apparent on its face, the 1954 Agreement is in no way dependent upon or aided by any such statute of the Texas Legislature. On the contrary, the Agreement provides that the Railroad shall *not* be required to maintain any general offices, machine shops or roundhouses at Palestine.

It would appear that the Missouri Pacific no longer has a willing ally in the ICC, as counsel for the Commission has informed Respondents that the ICC has voted not to file a Petition for a Writ of Certiorari to review the 5th Circuit Court's decision in this case. Either the ICC is satisfied that the Circuit Court (which, in effect, sustained the dissenting opinion of Commissioner O'Neal) is correct, or, at least, is unwilling under the facts of this case, to further assist the railroad to abrogate its contract with Palestine.

QUESTIONS PRESENTED

This case does *not* involve any "state law restraints" as stated in the Petition. The questions before the Court below and now presented by the Petition involve *the statutory authority of the ICC* under Sections 5(2) and 5(11) of the Interstate Commerce Act *to nullify a third party contract, entirely collateral to the merger, in an unopposed "family line" merger of three profitable railroads.*

SUPPLEMENTAL STATEMENT OF THE CASE

In addition to the factual matters set out in the 5th Circuit Court's opinion, we respectfully suggest that the following additional factual background is noteworthy:

A. Prior Proceedings

At the time of its 1954 agreement with the City and County, Missouri Pacific and its controlled subsidiaries, including I-GN had been involved in bankruptcy reorganization proceedings for more than twenty years. Various plans had been considered by the Court and by the Commission and either rejected, revised, reconsidered or appealed.[2]

Throughout the long course of these proceedings the debtor railroads and the Commission always favored reorganizing all of the debtor railroads, including I-GN, into one new Missouri Pacific Railroad Company and it was so provided in the original plan of reorganization. In its Report dated January 10, 1940, approving that plan with certain modifications, 239 I.C.C. 7, the Commission referred to a judgment of the Texas courts, affirmed by the United States Supreme Court,[3] ordering the railroad "to forever keep and maintain its general offices, machine shops and

[2] The course of these proceedings are reflected in part by the following orders, reports and opinions: *Missouri Pacific Railroad Company Reorganization*, Finance Docket No. 9918, 239 I.C.C. 7, 240 I.C.C. 15, 257 I.C.C. 479, 745, 275 I.C.C. 59, 203; 290 I.C.C. 477, 674. *In Re Missouri Pacific R. Co.*, 39 F. Supp. 436 (D. Mo. 1941), app. dis., 134 F.2d 139 (8th Cir. 1943), cert. dis. and denied, 320 U.S. 785, 88 L.Ed. 487; 64 F. Supp. 64 (D. Mo. 1945), aff'd., 163 F.2d 350, aff'd. 335 U.S. 211, 92 L.Ed. 1911 (1947); 93 F.Supp. 832 (D. Mo. 1950), aff'd., 191 F.2d 265 (8th Cir. 1951), cert. den. 342 U.S. 904, 96 L.Ed. 676, 686, 1339, 1372 (1952).

[3] *International & G. N. Ry. Co.* v. *Anderson County*, 246 U.S. 424, 62 L.Ed. 807 (1918).

roundhouses in Palestine"; noted the recommendation of the Examiner that the plan expressly provide that the consolidation would not affect the rights of the parties under such judgment, but held that Section 77(n) of the Bankruptcy Act (11 U.S.C.A. § 205(n))[4] made inclusion of such a provision unnecessary.

In a supplemental report dated April 9, 1940, Commissioner Splawn stated that to protect Palestine's rights, the plan should not permit the I-GN properties to be sold to outside interests without rendering the plan inoperative, or permit an exclusion of the I-GN from the reorganization if I-GN's creditors did not agree to the plan. 240 I.C.C. at page 31. When this plan reached the Bankruptcy Court for approval, that Court held that "in the absence of some modification of the decree in the State Court", then "either the general offices of the consolidated company must be moved to Palestine, or else the International-Great Northern must continue to be operated separately". The Court also said that *"Should the Reorganization Managers secure a modification of the decree in the Anderson County case"*,• then it was the opinion of the Court that the plan should be literally carried out through the medium of a single consolidated company. *In Re Missouri Pacific R. Co.*, 39 F.Supp. 436 (D. Mo. 1941) at pages 448, 449. From then on, the plan provided, alternatively, for the separate incorporation of I-GN "unless a modification of the decree can

[4] "No reorganization effected under this title and no order of the court or Commission in connection therewith shall relieve any carrier from the obligation of any final judgment of any Federal or State court rendered prior to January 1, 1929, against such carrier or against one of its predecessors in title, requiring the maintenance of offices, shops, and roundhouses at any place, where such judgment was rendered on account of the making of a valid contract or contracts by such carrier or one of its predecessors in title."

• Unless otherwise indicated, all emphasis in quotations is supplied.

be obtained". Supplemental Report dated July 4, 1944, 257 I.C.C. 479, at page 559.[5]

B. Negotiations For The 1954 Agreement

Since a final plan of reorganization, approved by the Commission, was not achieved until the issuance of the Commission's order of July 29, 1954 (290 I.C.C. 477; subsequently modified, 290 I.C.C. 674), it was not until then that the railroad could pursue the several suggestions of the Commission and the Bankruptcy Court that an attempt be made "to secure a modification of the decree".

Negotiations ensued. As Exhibit "A" to the 1954 Agreement shows, in 1954 the railroad had reduced its employee payroll at Palestine by some 90 employees and railroad employment in Palestine was at the lowest point since 1941. Under these circumstances the railroad found the City and County receptive to overtures promising the promotion and stabilization of railroad jobs there. The City relinquished any claim to have the entire general office forces of the Missouri Pacific moved to Palestine and agreed with Missouri Pacific that the City was entitled to the equivalent of the work force which would be stationed at Palestine if I-GN was operated as a separate railroad.

[5] In a concurring opinion Commissioner Splawn had the following to say about a future proceeding to annul the 1914 judgment of the Texas court: "I do not wish at this time and upon the present record to express an opinion as to whether the Commission has the power, acting in the future under the jurisdiction conferred upon it by Section 5 of the Interstate Commerce Act, to nullify the judgment obtained in the Texas courts in respect to the Palestine matter although the Commission is now expressly prevented from doing so in the bankruptcy proceeding. It would seem at the least that the Commission might be reluctant, if such a separate proceeding were later instituted, to circumvent the present expressed intention of Congress that such contracts should not be nullified." 257 I.C.C. at page 565.

The Railroad represented that with flexibility permitting it to station *either* office workers *or* shop workers *or* some of both at Palestine at any time and from time to time, it would have no difficulty in performing the agreement. Petition For Leave To Intervene, pps. 7-8.[6] The railroad proposed that in return for (a) a release from its obligations under the 1914 judgment to maintain general offices, machine shops, roundhouses and certain titled positions at Palestine, and (b) a promise on the part of the City and County (to be consented to and approved by the Attorney General of Texas) not to sue for money damages, penalties and forfeitures, the railroad would agree to maintain a stated percentage, subject to reduction in the event of future mergers and consolidations, of certain I.C.C. classifications of its system employees at Palestine. The City and County agreed. The City then passed an ordinance and the County Commissioners' Court an order authorizing the new agreement. Contemporaneously, the Railroad's Bankruptcy Trustee moved the Bankruptcy Court for, and secured, an order authorizing the Railroad to make the agreement. Such Motion recited that one purpose of the agreement was to provide for more definitely fixing the Railroad's employment obligations at Palestine in the event of future affiliations and consolidations with other railroads and that "said agreement is in the interest of the estate of the Debtor". Petition For Leave To Intervene, page 5. In accordance with the terms of the new agreement the City, County and Railroad then applied to the District Court of Cherokee County, Texas, for a revised judgment setting aside the 1914 judgment and approving the new agreement in lieu thereof.

[6] At the I.C.C. hearing it was stipulated and agreed that all factual statements contained in Palestine's Petition To Intervene could be accepted without further proof.

C. Approval By The District Court Of Cherokee County, Texas

However, all citizens were not convinced that the agreement would be mutually beneficial or would be performed in good faith by the railroad. As the Commission's Report and Order shows (348 I.C.C. at page 436), a group of citizens intervened in the State District Court proceeding to oppose approval of the new agreement by the Court and an adversary trial was held. At that trial the Chief Executive Officer of the railroad testified that one of the reasons for the agreement was to fix the railroad's obligations in the event of future combinations. He further testified that "we feel that we can always find sufficient work to do at Palestine and personnel to keep there; we don't think there will be any trouble about maintaining that percentage. *We are willing to take on that obligation*". 348 I.C.C. at pages 436, 437. At the conclusion of the trial, fully participated in by the City, County, Railroad, the citizens for and the citizens against, and with a consent and waiver filed by the Attorney General in behalf of the State of Texas, the new agreement was approved by the Court and incorporated in its judgment dated March 2, 1955.

D. Approval By The Interstate Commerce Commission

The 1954 Agreement provided that the City and County might, at their election, apply to the Interstate Commerce Commission for approval of the new agreement and that in such event the railroad would join with the City and County in presenting and seeking such approval. However, by a letter dated July 28, 1955, the Secretary of the Commission wrote the City and County that "it would seem that the Commission would have no jurisdiction to entertain an independent application for the approval of the agreement in

question. * * * As you probably know, the Commission's order of July 29, 1954, approving a plan for the reorganization of the International-Great Northern and other debtors, contemplates the filing of an application to carry out the plan under either the Bankruptcy Act or the Interstate Commerce Act upon confirmation of the plan by the court. In that connection, a timely application along the lines disclosed in your letter requesting approval of the agreement will be processed for determination by the Commission in due course." Petition For Leave To Intervene, p. 10.

The plan of reorganization was confirmed by the Bankruptcy Court on September 19, 1955, and by an application dated January 6, 1956, the Reorganization Managers applied to the Commission for an order authorizing them to consummate the plan by reorganizing all of the debtors into one company, i.e., Missouri Pacific Railroad Company, which would include the properties of the International-Great Northern. This application specifically referred to the 1954 Agreement as an obligation being assumed by the reorganized company; recited that the 1914 judgment had been set aside, and that the new agreement eliminated any requirement to maintain offices and shops at Palestine. The application further recited that the new agreement with Palestine was compatible and consistent with the public interest, was necessary or appropriate for or consistent with the proper performance by the railroad of its service to the public as a common carrier, would not impair its ability to perform that service, and was reasonably necessary and appropriate for such purpose, and requested the Commission to make all requisite findings in support thereof and grant all requisite authority for the consummation of the plan of reorganization. The Commission made the requested findings and approved the application. Petition For Leave To Intervene, pages 10-11. On March 1, 1956, a final

order was entered by the Bankruptcy Court, and the reorganized Missouri Pacific was at last in business, free of all of the Bankruptcy Act restraints under which it had operated since March 31, 1933, and of any obligation by judgment, statute or contract to maintain offices and shops at Palestine.

E. Evidence Before The I.C.C. And The Commission's Findings

At the time of the hearing, the Palestine Agreement obligated Missouri Pacific to employ 4.5% of its 7,842 employees in I.C.C. classifications I, II, IV, V, and VI(a) at Palestine, or 353 such employees, which could be made up out of any one or more of such employee classifications. Exhibit 11, Rodman.

In its Report in the instant proceeding dated May 4, 1976, the Commission approved the discussion, findings and conclusions of the Administrative Law Judge with respect to the Palestine Agreement. 348 I.C.C. at page 430. Among other things the Commission thus found:

> (1) At the time of the hearing, Missouri Pacific had its freight claims department, a diesel service facility and a freight car repair shop in Palestine. There were approximately 64 employees in the freight claims department, 222 in the car repair shop and 86 other employees • • • coming within I.C.C. Employee Classifications I, II, IV, V and VI(a) (which are the ones included within the 1954 Agreement) located at Palestine. 348 I.C.C. at page 437.
>
> (2) If Missouri Pacific is relieved of the obligations of the 1954 Agreement, then it wants to move this freight claims department to St. Louis. *There is nothing in the 1954 Agreement which prevents such removal.* Of these 64 freight claims department employees, 13 positions at Palestine and two in St. Louis would be eliminated and these employees would be assigned other

> work, except that employees with less seniority would lose their jobs. 348 I.C.C. at page 437. The railroad would save an estimated $240,238 per year by moving the freight claims department to St. Louis. 348 I.C.C. at page 443.
>
> (3) Missouri Pacific has no immediate plans to eliminate the car repair shops at Palestine. *It offered no testimony to show any monetary savings to be effected thereby.* Missouri Pacific concedes that *there is a need for such a shop facility in Texas* and that it would like to construct a new shop which would be modern in track layout, buildings and tooling. Of the 209 mechanical department employees at Palestine, relocation to a new shop located elsewhere in Texas would leave about 40 such employees at Palestine. The other 169 would have the opportunity to follow the work to the new shop location. There will always be some repair work done at Palestine because of the geography of the railroad. 348 I.C.C. at page 437. New shop facilities could not practically be built *in Palestine* because of the physical restraints of the surrounding town and the general topography in the area.[7] 348 I.C.C. 443. As noted, the same witness testified that there is no physical impediment to locating this new shop *elsewhere in Palestine or in the general area of Palestine,* and that the existing facilities there *are worth a number of millions of dollars.* 348 I.C.C. at page 437.

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[7] This is the sole basis for the footnote assertion at page 4 of the Petition to the effect that the shops "cannot be rebuilt" at their present location in Palestine. This contention was not asserted in the application or in the railroad's written testimony served before the hearing. It arose at the hearing as rebuttal to the testimony of the Railroad's witness, James W. Gessner, who lives in St. Louis, that there is no physical impediment to locating the new shop *elsewhere in Palestine or in the general vicinity of Palestine.* While there may not be sufficient space at the *present site* for an enlarged shop operation, the inference that there are not other suitable locations *in the general area* of Palestine near the Railroad's rights-of-way is simply not true. The City has offered to assist the Railroad in finding a suitable location.

(4) At the time of the hearing Missouri Pacific employed 372 agreement related employees at Palestine, that number being 19 more than the agreement requires. If all 64 freight claims employees and 169 mechanical department employees should be moved out of Palestine the annual loss in wages paid in Palestine would be $3,617,000. 348 I.C.C. at pages 437-438.[8]

THERE ARE NO VALID REASONS FOR GRANTING A WRIT

I. THE DECISION BELOW IS NOT CONTRARY TO, BUT IN KEEPING WITH, OTHER DECISIONS OF THIS COURT

The contention that the Circuit Court misconstrued Section 5(11) of the Interstate Commerce Act by taking the phrase "insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for * *" out of context, thereby limiting the power of the Commission to impose terms and conditions nullifying "state law restraints", is wholly without merit. Substantially the same contention was asserted in *Regents of the University System of Georgia* v. *Carroll*, 336 U.S. 586, 94 L.Ed. 363 (1950), but this Court held such a construction of a similar Act incorrect, saying:

> "One suggestion is that Petitioner's position has a specific statutory basis in § 303(r), which permits the Commission to prescribe such 'conditions' as are 'necessary to carry out the provisions' of the Act. We do not think the suggestion is sound. Congress has enabled the Commission to regulate the use of broadcast channels through a licensing power. It is in connection with this power that § 303(r) is to be interpreted.

[8]As noted above, Commissioner O'Neal's dissenting opinion states that abrogation of the contract "will greatly harm, if not devastate, the economy of Palestine, Tex." 348 I.C.C. at page 432.

> *The Commission may impose on an applicant conditions which it must meet before it will be granted a license, but the imposition of the conditions cannot directly affect the applicant's responsibilities to a third party dealing with the applicant.*
>
> "Petitioner also urges that a state court judgment should not be allowed to thwart the Commission's efforts to enforce the requirements of the Act. Since the Communications Act does not specifically empower the Commission to adjudicate the contractual liability of a licensee for its contracts or to declare a licensees' contracts unenforceable in the Courts, for this defense petitioner must depend upon general implications from the Act.
>
> "* * *
>
> 94 L.Ed. at pps. 374-375
>
> "* * * The Commission might refuse to issue a license until the applicant has demonstrated that it has been freed by the state courts from the obnoxious contract.
>
> "* * * Under the present statute, the Commission could make a choice only within the scope of its licensing power, i.e., to grant or deny the license on the basis of the situation of the applicant. It could insist that the applicant change its situation before it granted a license, *but it could not act as a bankruptcy court to change that situation for the applicant. * * * We do not read the Communications Act to give authority to the Commission to determine the validity of contracts between licensees and others.*"
>
> 94 L.Ed. at pages 375-376

See also *Stenger* v. *Stenger Broadcasting Corp.*, 28 F. Supp. 407 (D. Penna. 1939), and *Gulf, Mobile and Ohio R. Co.* v. *Illinois Central R. Co.* 225 F.2d 816 (5th Cir. 1955), cert. den., 350 U.S. 932, 100 L.Ed. 815, where the Court held the same principles apply to the Interstate Commerce Act, saying, at page 822:

> "Although the Regents case, supra, is not a railroad case, the reasoning of the Supreme Court in that case is quite apposite and is persuasive of the proposition that the licensing and regulatory powers granted to administrative bodies by Congress do not authorize the abrogation of or have the effect of abrogating, private contracts merely because such contracts may, to a considerable degree, affect the results sought to be accomplished by the act of regulation or licensing."

In the *New Haven Inclusion Cases*, 399 U.S. 392, 26 L.Ed. 2d 691 (1970) this Court observed that "Congress did not purport to transfer its legislative power to the unbounded discretion" of the Interstate Commerce Commission (26 L.Ed. p. 721). The framework of the Act is that carriers may freely contract without the consent or approval of the Commission unless the Act itself requires such approval or consent, and the Act confers no jurisdiction in the Commission *over contracts made by non-carriers* with a railroad. *United States* v. *Fruit Growers Express Co.*, 279 U.S. 363, 73 L.Ed. 739 (1929); *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422 84 L.Ed. 361 (1940), reh. den., 309 U.S. 694, 84 L.Ed. 1035.

The Commission's authority under Section 5 of the Act is limited to the approval or disapproval of *voluntary* mergers initiated by the carriers themselves. *St. Joe Paper Company* v. *Atlantic C.L.R. Co.*, 347 U.S. 298, 98 L. Ed. 710 (1954), reh. den., 347 U.S. 980, 98 L.Ed. 1118. Congress "left mergers of separate railroad properties into larger units to the will of their private owners, *merely lodging a veto power in the Commission*". (Frankfurter, J. in *Schwabacher* v. *United States*, 334 U.S. 182, 92 L.Ed. 1305 (1948), at page 1319). Under Section 5 the Commission may not require a non-willing carrier to merge. *Penn Central Merger & N. & W. Inclusion Cases*, 389 U.S. 486, 19 L.Ed.2d 723

(1968). It may not impose conditions with respect to "extrinsic matters" in such a proceeding, *United States* v. *Chicago, M. St. P. & P.R. Co.*, 282 U.S. 311, 75 L.Ed. 359 (1931), or impose conditions upon a party not involved in the merger. *Callaway* v. *Benton*, 336 U.S. 132, 93 L.Ed. 553 (1949). It does not have authority to alter a carrier's securities "just to promote the interest of the public or of investors generally in the stability or enhanced value, of railroad stock". *Wood* v. *United States*, 132 F.Supp. 586 (D. N.Y. 1955), at page 594.

Petitioner contends that the ICC is given the power of life or death over a railroad's contracts with non-carrier third parties by Section 5(11) of the Act which provides that "the authority conferred by this section shall be exclusive and plenary", and that "any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power * * * to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under state authority"; and that such participating carriers "shall be and they are hereby relieved from the operation of the antitrust *laws* and of all other *restraints*, limitations and prohibitions *of law*, Federal, State, or municipal, *insofar as may be necessary to enable them to carry into effect the transaction so approved* or provided for in accordance with the terms and conditions, if any, imposed by the Commission * * *."

It is noteworthy that the words "contract" or "agreement" are not found in this paragraph at all. It speaks solely of *laws* and *restraints of law*. Moreover, as to these restraints, the paragraph is self-operative. It provides that the participating carriers "shall be and are hereby relieved"

of such laws and restraints of law. As the 5th Circuit Court held, the "restraints" referred to in paragraph 5(11) are only those which would either prevent the carrier from "carrying the transaction into effect" or would require "invoking an approval under the state authority". No such restraints are involved here. The merger is an accomplished fact, and was accomplished *pendente lite* in September, 1976, shortly after the stay order granted Rock Island by the 7th Circuit Court (as a part of its order transferring the Rock Island's Petition to Review the same order to the 5th Circuit) expired.

Without spelling out this fact (but with knowledge of it) the Court below correctly held that "the ICC's power only extends to setting aside state restraints to the effectuation of an approved Section 5(2) transaction and no further"; that "the agreement clearly is not an obstacle to the merger of T&P and C&EI and does not threaten the merger's success"; that "the ICC exceeds the scope of its authority when it voids contracts that are not germane to the success of the approved Section 5(2) transaction"; that "actions taken by the ICC in connection with these transactions but not necessary to them exceed the scope of its authority"; that "the Palestine Agreement has no role in the ICC's analysis of the proposed voluntary merger of MoPac, T&J, and C&EI"; that although the Administrative Law Judge and the ICC concluded that the Palestine Agreement was a burden on interstate commerce, "there is no indication that this burden presents any obstacle to the merger"; and that "despite the irrelevance of the Palestine Agreement to the merger, the ICC has gratutiously relieved MoPac of its contractual obligation."

Furthermore, there is an obvious distinction between *restraints of law imposed* by the Sovereign, and *contract*

restraints, voluntarily assumed by the carrier. "There is a distinction, says Blackstone, between a contract and a law". *Landon* v. *Town of Litchfield*, 11 Conn. 251, 266 (source: *Words and Phrases*, Vol. 24A, page 13); *Swift* v. *Tyson*, 41 U.S. (16 Pet.) 1, 10 L.Ed. 865, (1842); *McMurray* v. *Wright*, 73 P. 257, 261 (Colo. Ct. App. 1903); *Four Packages of Cut Diamonds* v. *United States*, 256 F. 305 (2nd Cir. 1919); *Contemporary Music Group, Inc.* v. *Chicago Park District*, 343 F.Supp. 505 (D. Ill. 1972). Even in *Texas* v. *United States*, 292 U.S. 522, 78 L.Ed. 1402 (1934), upon which Missouri Pacific relies, the Court noted that "contractual obligations" are distinguishable from "obligations imposed by statute". 78 L.Ed. at page 1410.

In the dissenting opinion of Mr. Justice Frankfurter in *Schwabacher* v. *United States*, 334 U.S. 182, 92 L. Ed. 1305 (1948), the powers conferred on the Commission under the Bankruptcy Act are compared with those conferred on the Commission by Section 5 of the Interstate Commerce Act. He states that Congress could have conferred coercive powers in the Commission by the latter act,

> *"But that is precisely what Congress has refused to do.* * * * It left mergers of separate railroad properties into larger units to the will of their private owners, *merely lodging a veto power in the Commission* if such voluntary mergers run counter to the defined public interest. * * *
>
> "The Commission was charged with seeing to it that *the very limited requirements of § 5(2) were observed,* and to that end was given 'exclusive and plenary' authority. § 5(11). *The purpose was to authorize a voluntary agreement not to formulate a plan and to coerce its adoption, as is true of § 77.* * * * The great difference between these requirements (§ 5) and the detailed and comprehensive provisions of § 77, 11 U.S.C.A. § 205, 3 F.C.A. title 11, § 205, carries a sharp legal contrast between the *authorization* which Congress required for

voluntary mergers *and* the *coercion* of an imposed plan of reorganization in the case of insolvent roads. * * *

"While § 5(11) relieves parties to an approved merger from the restraints of other laws 'Federal, State or Municipal', *it does so only 'insofar as may be necessary to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission . . .'*

"The considerations relevant to voluntary mergers sharply differ from those that control liquidations and reorganizations under § 77 of the Bankruptcy Act. * * * *A railroad in reorganization is administered by a bankruptcy court which has control of all its assets. The power of dealing with all claims is inevitably concentrated in that court.* * * * I fail to see that the effect (of such minority stockholders claims) on the Chesapeake & Ohio will be any different than that of negligence claims for the same amount. Every operating railroad is likely to have such claims outstanding against it at all times. *Their existence does not interfere with the consummation of a voluntary merger.* * * *"

92 L.Ed. at pages 1319, 1320

Unless the meaning of "restraints of laws" is stretched out of all proportion to its true meaning to include "restraints voluntarily assumed by a carrier by contract", then *Texas* v. *United States*, 292 U.S. 522, 78 L.Ed. 1402 (1934); *Schwabacher* v. *United States*, 334 U.S. 182, 92 L.Ed. 1305 (1948), and *Seaboard Airline R. Co.* v. *Daniel*, 333 U.S. 118, 92 L.Ed. 580 (1948), relied upon by Petitioner are not in point. Each of these cases related to the authority of the Commission to relieve a carrier from *statutory restraints* over which it had no control — *not contractual obligations voluntarily solicited and assumed*. If Congress had intended to give the Interstate Commerce Commission such powers, we submit it would have said so in so many words and

would not have disguised its intention to do so within the phrase "anti-trust laws and other restraints of law."

In its opinion in *Texas* v. *United States*, 292 U.S. 522, 78 L.Ed. 1402 (1934), this Court stated that the single point there in controversy was *the authority of the Commission* to approve a lease agreement *between two railroads* permitting the lessee to abandon or remove from the State the general offices and shops of the lessor railroad *when such provision of the lease was attacked as being in violation of these same Texas Office-Shops Statutes*. 78 L.Ed. at p. 1405. The court held that the Commission was empowered by Section 5 of the Interstate Commerce Act, upon making the required finding of undue burden on interstate commerce, to relieve the carrier of such *state statutory burdens;* but it also noted that "contractual obligations" are distinguishable from "obligations imposed by statute". 78 L.Ed. at page 1410. *Third party contractual rights were in no way involved.*

Seaboard Air Line R. Co. v. *Daniel*, 333 U.S. 118, 92 L.Ed 580 (1948) also involved the authority of the Interstate Commerce Commission to relieve a carrier from the burdens of *state constitutional and statutory provisions* which it found to unduly burden interstate commerce. This Court again held that the Commission had adequate power under Section 5 of the Act "to override *state laws* which may interfere with efficient and economical railroad operation". (92 L.Ed. 586). *Here again no third party contractual rights were in issue.*

Schwabacher v. *United States*, 334 U.S. 182, 92 L.Ed. 1305 (1948), decided by this court the same year is in similar vein. The Court stated that it was called upon to determine the effect of the *state law* in relation to a constitutional Act of Congress. The precise question at issue was

as to the rights of certain minority preferred stockholders to be paid dividends and the liquidation value they claimed for their stock which was in excess of the values found by the Commission (to which a majority of the stockholders had assented). The Court held that the Commission erred in holding it could not determine these minority stockholders' rights while at the same time, in effect, giving them full credit by the terms of the merger. It said:

> "Since the federal law clearly contemplates merger as a step in continuing the enterprise, it follows that what *Michigan law* might give these dissenters on a winding up or liquidation is irrelevant, except insofar as it may be reflected in current values for which they are entitled to an equivalent. It would be inconsistent to allow state law to apply a liquidation basis to what federal law designates as a basis for continued public service.
>
> 92 L.Ed. at p. 1316-17
>
> "• • •
>
> "We therefore hold that no rights alleged to have been granted to dissenting stockholders by *state law* provision concerning liquidation survive the merger agreement approved by the requisite number of stockholders and approved by the Commission as just and reasonable."
>
> 92 L.Ed. at p. 1317

This case is distinguishable on several grounds. It involved *state law*, not contracts. It involved *stockholders* directly involved in the merger, *not third parties*. And finally, Section 5(11) specifically addresses itself to such stockholders' rights and requires assent by a majority "unless a different vote is required under applicable state law". These specific provisions clearly prevail over any *state law* to the contrary. It is also significant that even stockholders' rights are protected in merger cases by the provisions of

the Act, § 5(11), which require the assent of a majority (or such different vote as may be required by applicable state law) of the stockholders to the proposed plan of merger before the Commission may act thereon.

In contrast to these cases which relate to *state law restraints*, is the case decided two years later by the Supreme Court, *Regents of the University System of Georgia* v. *Carroll*, 338 U.S. 586, 94 L.Ed. 363 (1950) mentioned above, which does relate to *contractual rights*.

In his Initial Decision, the Administrative Law Judge stated that "the Commission has on numerous occasions relieved carriers from the same Texas statutes and similar contractual obligations in proceedings under Section 5" citing only *St. Louis S.W. Ry. Co. of Texas Lease*, 290 I.C.C. 205 (1953) and *Kansas City Southern Ry. Co. Merger*, 254 I.C.C. 529 (1943).

Even if those cases represented a "settled construction" of the Act by the Commission, which they do not, if that construction is wrong it will not be followed. *Interstate Commerce Commission* v. *Dunn*, 166 F.2d 116 (5th Cir. 1948), at page 117.

But neither of the cases cited by the Commission is in point here. In the *Kansas City Southern* case, the Commission's Report states (254 I.C.C. at page 529):

> "No representations have been made by any state authority *and no objection to the transaction has been offered.*"

Thus, if any third party contract rights were involved, and none are mentioned in the Commission's Report, the affected parties raised no objection. Moreover, the Report indicates that the applicants sought relief from state statutes, not a contract:

"• • • Applicants contend that the merger cannot be consummated unless the Commission shall attach certain conditions designed to relieve the parent company of complying with certain laws of the State of Texas. • • • (254 I.C.C. at page 531).

"(Applicants) • • • assert that, unless we attach appropriate conditions in connection with our approval of the merger *to free the merged company from such burdensome state laws*, the merged company at some time in the future may be compelled to suffer substantial injury by reason of being forced to comply therewith. (254 I.C.C. at page 536).

"• • •

"Unless the requisite conditions are imposed, the Applicants are of the opinion that the merger will not be consummated." (254 I.C.C. at page 537).

The differences between the *St. Louis Southwestern Railway Company* case and this case are even more striking. While the Report and Order of the Commission in that case did mention a contract between the City of Tyler and a predecessor company dated May 8, 1880, whereby the Railroad agreed to establish and perpetually maintain in Tyler its machine shops and general offices, and did purport to relieve the railroad of the obligations of that contract, the Report also shows (290 I.C.C. at p. 212) that "*The City Commission of Tyler* and the two Chambers of Commerce in that city *urged approval of the proposed lease and of the conditions relieving the applicant from* the operation of the Texas laws previously described, including *the agreement with the City of Tyler,*" and that "No exceptions to the report proposed by the Examiner were filed". 290 I.C.C. at p. 205.

Thus, both parties to the City of Tyler agreement urged the Commission to change that contract by approving the

Lease between the railroad and its subsidiary which so provided. Merely approving a consensual agreement between the parties is a vastly different thing from nullifying an agreement between a railroad and non-consenting third parties. At the time of the I.C.C. hearing, Tyler wanted the old agreement superceded because the parent company, St. Louis Southwestern Railway Company, offered the City something much better. It proposed to move various departments and employees from *St. Louis to Tyler.*

Some 12 years later, in 1965, Tyler changed its mind. It filed a petition in a Texas District Court alleging that the railroad was moving its general offices and machine shops from Tyler in violation of the City's original agreement with the railroad and a 1906 state court judgment validating the agreement. The suit was removed to the United States District Court for the Eastern District of Texas, and the railroad also filed a separate suit in such Federal District Court for a declaratory judgment that the 1906 State Court judgment against it was void and unenforceable and enjoining further prosecution of the contempt proceedings in the State Court.

When the Federal Court remanded Tyler's suit in the Federal Court for declaratory and injunctive relief to the State Court, the railroad then filed an original proceeding in the Supreme Court of Texas in the form of a motion to vacate, modify or suspend the 1906 judgment. The Texas Supreme Court declined to take jurisdiction holding that jurisdiction to determine in the first instance whether a judgment rendered and entered by it as a court of review has become void or unenforceable because of changed conditions "lies with the trial court in which the case was pending when final judgment was entered." *City of Tyler*

v. *St. Louis Southwestern Railway Company of Texas*, 405 S.W.2d 330 (Tex. Sup. Ct. 1966) at page 332.

The railroad then tried its suit in the Federal District Court seeking a declaratory judgment that the Interstate Commerce Commission's order of December 18, 1953, authorizing the lease between the parent and its subsidiary (290 I.C.C. 205), superceded the state court judgment, and for an injunction against the City from further prosecution in the state court of its motion to require the railroad to show cause why it should not be held to be in contempt of the 1906 state court judgment. The federal District Court declined jurisdiction holding that "a Federal Court should abstain from entertaining any Federal declaratory judgment action when the questions involved * * * can just as well be tried in the state court as they could in the Federal Court" and that "the declaratory judgment remedy should not be invoked to determine the validity of a defense in a pending case in a state court." *St. Louis Southwestern Railway Co.* v. *City of Tyler, Texas*, 375 F.2d 938 at p. 942 (5th Cir. 1967).

In accordance with the Texas Supreme Court's holding, the railroad then filed a motion in the State District Court to vacate, modify or suspend the 1906 judgment. After hearing, such Court refused the railroad's motion, holding that the Interstate Commerce Commission's uncontested order approving the lease, which had by then been outstanding for some 14 years, was void insofar as it purported to authorize violation of the 1891 contract and the 1906 judgment. The railroad appealed that decision to the Texas Court of Civil Appeals and it is the opinion of that Court (*St. Louis Southwestern Ry. Co. of Texas* v. *City of Tyler*, 422 S.W.2d 780, Tex. Civ. App. 1967, writ ref. n.r.e.), which is relied upon by the Petitioner as an acknowledgment by a Texas court of the ICC's power to

nullify "state law restraints — such as the Palestine Agreement." (Petition, p. 21).

Such Texas intermediate appellate court did hold that the Interstate Commerce Commission "has the power under the Transportation Act of 1920 and amendments thereto to relieve railroads from the operation of private contracts" citing and quoting from *Texas* v. *United States* and similar authorities. As pointed out above, *Texas* v. *United States* related to obligations imposed by the state *statutes, not* consensual obligations arising from private *contracts.* Although the opinion in *Texas* v. *United States* also states that "even explicit charter provisions must yield to the paramount regulatory power of the Congress" and that "Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable, or to impair its value", the question here is whether Congress has done so with respect to private contractual agreements. While charter obligations imposed by state statutes and assumed by railroad as a *sine qua non* for the grant of a charter may or may not be within the purview of Section 5(11), certainly such obligations, legislatively imposed, are not in the same class with and are readily distinguishable from obligations voluntarily assumed in a private contract which the railroad was free to enter into or not at its own volition. At most, the cases cited by the Texas intermediate appellate court (the same cases cited in the Commission's Initial Decision) stand for the proposition that *Congress* has constitutional power under the Commerce Clause to grant Federal agencies the right to nullify private agreements. This is not authority for the position that Congress *did grant* such powers to the Interstate Commerce Commission when it provided that "carriers participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved *from the operation of the*

antitrust laws and of all other restraints, limitations and prohibitions *of law,* Federal, State or municipal."

However, the Texas Court did not rest its decision on that ground alone. It also held that *by urging approval of the lease, including the provision nullifying the 1891 contract and the 1906 judgment, and by waiting some 12 to 15 years before* taking a contrary position, the City of Tyler was estopped from taking a new position, saying:

> "The lease was based upon a specific condition invalidating the contract upon which the injunction was based, and the City of Tyler which was the beneficiary under the contract and the injunction reaped benefits made possible by the approval of the lease by the Interstate Commerce Commission. *After a silence of more than a decade the city could not equitably challenge the order of the Interstate Commerce Commission and the Railroad's change of position and reliance thereon.*"
>
> 422 S.W.2d at page 786

Since these were the only two grounds set forth in the Texas Court's opinion for overruling the trial court's judgment in favor of the City, we submit that when the Texas Supreme Court refused the City's application for writ of error with the notation "Refused, No Reversible Error",[9] it obviously disapproved that part of the lower

[9] At page 21 of the Petition, Petitioner states that the Texas Supreme Court "refused" the application for a writ of error. This is incorrect. The action it took was "Refused, No Reversible Error". This distinction is quite important. Texas Rule of Civil Procedure 483 provides, in part, "In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court will refuse the application with the docket notation 'Refused.' In all cases where the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application with the notation 'Refused. No Reversible Error.'

court's opinion which held that the Interstate Commerce Commission could nullify private contracts in a Section 5(2) proceeding, but nevertheless approved the result because of the Court's further holding that the City of Tyler was estopped, after urging the Commission to approve the lease, securing an order so providing, and receiving the benefits thereof, to take a contrary position more than 10 years later in another forum.

Section 5(11) of the Interstate Commerce Act has existed in substantially its present form for more than 35 years. It seems reasonable to assume that, in that time span, if the Commission has in fact exercised jurisdiction to nullify any contracts not requiring Commission approval when made, made by carriers with non-carrier parties, at least one such party would have objected and its objection would have been noted in the Commission's report and order. We submit that in truth and in fact there is no such case because no such jurisdiction has heretofore been asserted by the Commission.

II. THE DECISION OF THE COURT BELOW UNDER THE FACTS BEFORE IT CANNOT POSSIBLY HAVE ANY IMPACT ON THE DEVELOPMENT OF EFFICIENT AND ECONOMIC RAIL SYSTEMS

The case at hand is not that of a railroad struggling to meet operating costs, seeking a merger into or with another independent railroad which is burdened with an improvident contract, the performance of which would prevent or seriously affect the success of the merged operation. On the contrary, we have the case of a prosperous parent paying substantial dividends and prosperous subs paying substantial dividends, with the parent and its stockholders seeking to abrogate a contract of the parent (which it

sought, and considered highly advantageous when made) in a non-contested merger proceeding, the sole effect of the abrogation of which will be to increase the amount of profits available for paying dividends.

By an instrument called a "merger agreement" Missouri Pacific's stockholders declared themselves to be rid of their 1954 Agreement with Palestine, and sought to have this unilateral declaration legitimatized by the Commission in a non-contested proceeding to accomplish the "formal amalgamation" of that which has been true *de facto* for many years. As the Court said in *Breswick & Co.* v. *United States*, 134 F.Supp. 132 (D. N.Y. 1955):

> "What it [the Commission] did was to permit a merger of two carriers which were already controlled by a parent carrier . . .
>
> "• • •
>
> "The prayer for approval of the merger is treated as if it were an effective but meaningless incantation to propitiate a medicine man." 134 F.Supp. at page 143.

No public interest is served by the abrogation of this contract; only the interests of Missouri Pacific's stockholders in seeking to rid their Company of an agreement originally beneficial but no longer useful to it.

The court's comments in *Gulf, Mobile and Ohio R. Co.* v. *Illinois Central R. Co.*, 225 F.2d 816 (5th Cir. 1955), cert. den., 350 U.S. 932, 100 L.Ed. 815, seem highly pertinent here:

> "Notwithstanding appellant's effort to depict itself as being legally required constantly to seek out new plans and arrangements that might better serve the shipping and travelling public, we know of no rule of law that makes such duty paramount or superior to the duty to carry out its solemnly made contracts.
>
> "• • •

> "Appellant's attempt to clothe its own efforts to achieve a substantial financial saving for itself with the mantle of public duty of the kind that overrides the obligation of a contract, is not persuasive. We find nothing in the Interstate Commerce Act or any of the decided cases that supports any such theory."
>
> 225 F.2d at pages 823, 824

The Interstate Commerce Commission is not in business to nullify a railroad's improvident contracts. As this Court said more than fifty years ago in *Arkansas Natural Gas Company* v. *Arkansas Railroad Commission*, 261 U.S. 379, 67 L.Ed. 705 (1923), while the government has power to regulate public utilities notwithstanding the effect may be to abrogate private contracts, "there is, quite clearly, no principal which imposes an obligation to do so merely to relieve a contracting party from the burdens of an improvident undertaking." • • • The power to do so does not exist *per se*. It is the intervention of the public interest which justifies, and at the same time, conditions, its exercise." 67 L.Ed. at page 710.

More recently, in *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 100 L.Ed. 388 (1956), the Court applied the same principles to a federal administrative order. There the Federal Power Commission's order purported to set aside a contract rate where it yielded only a 2.6% return and to establish a new rate which would yield a 4.75% return. The Court held that the FPC had acted upon "an erroneous standard," saying:

> "But while it may be that the Commission may not normally impose upon a public utility a rate which would produce less than a fair return, it does not follow that a public utility may not by itself agree by contract to a rate affording less than a fair return or that, if it does so, it is entitled to be relieved of its

improvident bargain * * *. That the purpose of the power given the Commission by § 206(a) is the protection of the public interest, as distinguished from the private interests of the utilities, is evidenced by the recital in § 201 of the Act that the scheme of regulation imposed 'is necessary in the public interest'."

100 L.Ed. at page 395

As Commissioner O'Neal observed in his dissenting opinion "there is no overriding public policy reason for abrogating the contract, even if we make the doubtful assumption that the Commission could do so in this case. * * * *Abrogation in this case serves no public purpose, only the private purposes of the railroad.*" 348 I.C.C. at page 432.

The public interest would more likely be served by requiring performance of the contract. By Section 5(2)(f) of the Act Congress has decreed its policy to be that such mergers shall "not result in employees of the carrier . . . being in a worse position with respect to their employment." The employees at Palestine would be in a worse position if their jobs were moved elsewhere, and they wish to remain at Palestine where their homes are, their children are in school, and they have fixed roots. In *Railroad Telegraphers* v. *Chicago & N.W. R. Co.*, 362 U.S. 330, 4 L.Ed.2d 774 (1960), where the railroad, over the protest of the affected railroad employees, sought authority to shut down a great many of its local stations, this Court pointed out that "fair terms and conditions of railroad employment are essential to a well-functioning national transportation system" and that while increased wages and better working conditions might sometimes increase the expense of railroad operations, "it goes without saying * * * that added expenditures for employees cannot always be classified as 'wasteful'." 4 L.Ed.2d at page 783.

To say the least, the Railroad's motives are suspect. Although it says it wants to eliminate an estimated 15

jobs in the freight claims department by transferring 64 employees to St. Louis and thereby "save" an estimated $240,000, the record shows that at the time of the hearing it employed some 19 more employees at Palestine than the Agreement required, which represents a payroll expenditure of some $200,000 per year. Moreover, the estimated saving of $240,000 per year is more than overbalanced by the economic loss to Palestine of a $3,000,000-$4,000,000 per year payroll, the forcible uprooting of more than 200 unwilling employees from their homes in Palestine to other places, and the massive economic waste involved in the abandonment by Missouri Pacific of its facilities now at Palestine which it states are worth "a number of millions of dollars".

At the time of the hearing the 1954 Agreement required Missouri Pacific to employ 4.5% (or 353) of its 7,842 employees in I.C.C. Classifications I, II, IV, V and VI(a) at Palestine. Now, with the merger of T&P and C & EI into Missouri Pacific, a lesser percentage will apply, in that the Agreement provides that in the event of the merger or consolidation of the Missouri Pacific with other railroads, a new percentage is to be calculated for the consolidated corporation based on the number of employees within the affected I.C.C. employee classifications on the payrolls of the affected lines over the five year period immediately preceding the merger. Thus, the actual number of employees required to be stationed at Palestine after the merger will depend entirely upon the number of such employees of the Missouri Pacific, T&P and C. & E.I. during such five year period. If the five year average differs substantially from the number now employed, the number required at Palestine after the merger will likewise differ substantially. Since the railroad failed to offer these numbers so that the new Palestine percentage could be calcu-

lated and applied, it seems proper to assume that such proof would have been adverse to it and perhaps have shown that the actual number required at Palestine after the merger would have been less than the number required at the time of the hearing. In any event, it was incumbent upon the railroad, as a minimum, to show the effect of operating under the contract as merged and this it did not do.

III. THE DECISION BELOW IS NOT CONTRARY TO DECISIONS OF OTHER COURTS OF APPEALS CONSTRUING THE COMMISSION'S AUTHORITY UNDER SECTIONS 5(2) AND 5(11) OF THE INTERSTATE COMMERCE ACT

None of the three cases cited by Petitioner in this part of its Petition (pages 18-20, inclusive) are in point with regard to the facts of this case in that each relates to a federal or state *legislative restraint of law* — not a contractual obligation voluntarily assumed by the carrier.

A case which is in point, and which did relate to the ICC's power to alter contractual obligations is *Texas & New Orleans Railroad Co.* v. *Brotherhood of Railroad Trainmen*, 307 F.2d 151 (1962), cert. den., 371 U.S. 952, 9 L.Ed. 2d 500.

WHEREFORE, PREMISES CONSIDERED, Respondents pray that the Court deny issuance of the writ of certiorari requested in the Petition.

Respectfully submitted,

JAMES D. SMULLEN
BUTLER, BINION, RICE, COOK & KNAPP
1100 Esperson Buildings
Houston, Texas 77002
(713) 237-3114

Attorneys for Respondents, City of Palestine, Texas and Anderson County, Texas

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief was served on all parties to the proceeding in the Court below on the ..... day of March, 1978, in accordance with the rules.

.....
James D. Smullen

APPENDIX

BEFORE THE

INTERSTATE COMMERCE COMMISSION

Finance Docket
No. 2773, 2774

Joint Application of

MISSOURI PACIFIC RAILROAD COMPANY, THE TEXAS AND PACIFIC RAILWAY COMPANY, and CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY.

(1) Under Section 5(2) of the Interstate Commerce Act for an Order Authorizing (a) the Merger of the Properties and Franchises of The Texas and Pacific Railway Company, and the Chicago & Eastern Illinois Railroad Company with and into the Missouri Pacific Railroad Company, (b) the Acquisition by Missouri Pacific Railroad Company, through Ownership of Stock, of Sole or Joint Control of Carriers Subsidiary to or Affiliated with The Texas and Pacific Railway Company, and the Chicago & Eastern Railroad Company;

(2) Under Section 20a of the Interstate Commerce Act for an Order Authorizing the Surviving Corporation Resulting from such Merger, i.e., Missouri Pacific Railroad Company, to Issue Common Stock and to Assume Liability in Respect of Securities to the Extent to which any other Applicant is Liable as Obligor or Guarantor Thereof; and

[2]

(1) Under Section 5(2) of the Interstate Commerce Act for an order authorizing (a) the merger of the properties and franchises of The Texas and Pacific Railway Company, and the Chicago & Eastern Illinois Railroad Company, with

and into the Missouri Pacific Railroad Company, and (b) the acquisition by Missouri Pacific Railroad Company through ownership of stock, of sole or joint control of carriers subsidiary to or affiliated with The Texas and Pacific Railway Company, and the Chicago & Eastern Illinois Railroad Company; and

(2) Under Section 20a of the Interstate Commerce Act for an order authorizing the surviving corporation resulting from such merger i.e., Missouri Pacific Railroad Company (MoPac), to issue Common Stock and to assume liability in respect of securities to the extent to which any other Applicant is liable as obligor or guarantor thereon.

• • • • •

[10]

(b) (7) Missouri Pacific Railroad Company controls The Texas and Pacific Railway Company through direct ownership of 96.7% of its outstanding capital stock, and controls the Chicago & Eastern Illinois Railroad Company through direct ownership of 78.3% of its outstanding capital stock.

[11]

Mississippi River Corporation controls Missouri Pacific Railroad Company through direct ownership of 7,811,975 shares of the latter's capital stock, which holding represents 63.6% of the MoPac's Common Stock, 62.1% of MoPac's Preferred Stock and 62.5% of all outstanding MoPac stock.

• • • • •

[16]

(c) (2) The Merger is to be effected under authority of Section 5 of the Interstate Commerce Act, as amended,

pursuant to the terms of an Agreement and Plan of Merger (hereinafter sometimes called the "Agreement") entered into by and between the Applicants and dated as of the 29th day of July, 1974. A copy of said Agreement is attached hereto as Appendix A to Exhibit 16 (Part I), the Proxy Statement for the meetings of Applicants' Stockholders.

• • • • •

The Commission has, in previous proceedings involving other railroads, dealt with the restrictions and requirements arising under the Constitution and Statutes of the State of Texas relating to operations of railroads within the State of Texas, including contractual obligations arising therefrom.

[17]

The Constitutional provisions previously considered by the Commission, specifically Sections 3 and 6 of Article 10, required that every railroad doing business in the State shall maintain a public office for the transfer of stock and the inspection of books and records; that directors thereof shall hold annual meetings in Texas; and that no Texas railroad shall consolidate with a railroad company organized under the laws of another state. These provisions were repealed by the voters at an election held August 5, 1969.

There, however, remains on the statute book of the State of Texas a number of articles, specifically Articles 6260, 6275 to 6281, inclusive, 6286 and 6310 of Vernon's Annotated Civil Statutes of Texas, which provide: That no corporation, except one chartered in Texas, shall be permitted to construct, build, operate, acquire, own, or maintain a

railway within the State; that every railroad company chartered by the State, or owning or operating any line of railway within the State, shall keep and maintain permanently its general offices within the State; that every railroad operating in Texas shall keep its machine shops and roundhouses at such place as it has contracted to keep them; that every railroad operating in Texas shall maintain at the place in Texas where its general offices are located, or elsewhere in Texas with the permission of the Railroad Commission of Texas, the offices of its president or vice president, secretary, treasurer, local treasurer, auditor, general freight agents, traffic manager, general manager, general superintendent, general passenger and ticket agent, chief engineer, superintendent of motive power and machinery, master mechanic, master of transportation, fuel agent and general claim agent, and that each such officer must reside at the place where his offices are kept; that railroads operating in and having repair shops in Texas must perform in Texas the repair on all rolling stock owned or leased when such equipment is in Texas; that the principal business of the railroad corporation must be conducted and claims for damages settled and adjusted at the general offices located in Texas; that every railroad corporation doing business in Texas shall maintain a public office for the transaction of its business and the transfer of its stock, at which point there must be kept books in which shall be recorded certain information relating to capital stock, the assets and liabilities of the corporation and the names and addresses of its officers; that directors and stockholders thereof hold annual meetings in Texas; that the location of the general offices, machine shops and roundhouses may not be changed without the consent of the Railroad Commission of Texas; and that a penalty of $5,000.00 will prevail for each day that a railroad violates any of such statutory provisions.

These statutes by their terms may be applicable not only to Texas corporations but also to foreign corporations doing a railroad business in Texas. While the Applicants believe that the maintenance of certain offices and facilities in the State of Texas will be in the best interests of the surviving MoPac, they also believe that it would be an intolerable burden on the resulting system for any or all of the specific offices and facilities enumerated in the Texas statutes to be required to be maintained by MoPac in Texas or at any specific location in that State, and for MoPac otherwise to have to comply with the requirements of the

[18]

Texas laws or any contract or agreement relating thereto or any judgment or decree of any Court arising therefrom or in connection therewith. To be required now to move offices and facilities which are outside Texas into Texas, or to maintain in Texas or at any point therein, offices or personnel, would be costly and wasteful and unduly interfere with the flexibility which the System needs to meet changes in operating, traffic and economic conditions as they arise, and to effect the benefits contemplated by the proposed merger. If the State laws, and any contracts which have been entered into in accordance with such laws and any judgments or decrees with respect thereto, were to be applicable to the surviving MoPac they would hinder efficient operations and service and impose undue burdens on the resulting System and on interstate commerce. Necessity for compliance therewith by MoPac would not, therefore, be consistent with the public interest but would constitute an unreasonable burden on interstate commerce.

Accordingly, Article VIII of the Agreement and Plan of Merger has been drawn specifically to negative the applica-

tion of the restraints of the type aforesaid imposed by the provisions of laws of any state or contracts with any counties or municipalities, and any judgments or decrees with respect thereto, and the Applicants request the Commission specifically to approve such provisions and, accordingly to subject its approval of the transaction herein proposed to conditions similar to those which it prescribed in connection with the merger of the Texarkana & Fort Smith Railway Company into the Kansas City Southern Railway Company, 254 I.C.C. 529 (1943), and again in connection with the lease by the St. Louis Southwestern Railway Company of Texas, 290 I.C.C. 205 (1953).

• • • • •

[22]

The Applicants, together with their respective subsidiaries, have been and are now operated as a system with many common officers as shown hereinabove under the answer to (b) (11) above. Over the years, and to the extent possible in light of the essentially end-to-end character of the applicant railroads, many coordinations of facilities and functions and pooling of equipment have been put into effect between them, with the result that many of the economies ordinarily to be expected in a merger of railroads have in this instance already been effected. Nevertheless, as is stated aforesaid, there are many economies and simplifications which can still be made as a part of complete corporate amalgamation.

• • • • •

Because, as stated aforesaid, many of the usual coordinations and economies found in mergers have already been effected by the Applicants, it is anticipated that the displacement of employees will be at the very minimum, and that the principal effect, if any, will result from the transfer of positions and not so much from their elimination.

• • • • •

[23]

Since the Applicants are already part of a system, the formal amalgamation of their properties for common ownership can have no adverse effect on other railroads.

• • • • •

[31]

PRAYER

WHEREFORE, the Applicants pray that the Interstate Commerce Commission issue an order herein: (1) under Section 5 (2) of the Interstate Commerce Act authorizing the Applicants, The Texas and Pacific Railway Company and the

[32]

Chicago & Eastern Illinois Railroad Company to merge their franchises and properties, including property interests held under lease and contract, with and into the Applicant, Missouri Pacific Railroad Company, for ownership, management and operations in accordance with the terms and conditions as set forth in the Agreement and Plan of Merger and as requested in paragraphs (c) and (d) of Part I of this Application, and authorizing the acquisition by Missouri Pacific Railroad Company, through stock ownership, of sole or joint control of carriers subsidiary to or affiliated with The Texas and Pacific Railroad Company

and the Chicago & Eastern Illinois Railroad Company; and (2) under Section 20a of the Interstate Commerce Act authorizing the Missouri Pacific Railroad Company to issue shares of its capital stock and to assume liability of the other Applicants in respect of securities as set forth herein in the manner and for the consideration, uses and purposes set forth herein.

Respectfully submitted,

MISSOURI PACIFIC RAILROAD COMPANY

By J. H. Lloyd
President

THE TEXAS AND PACIFIC RAILWAY COMPANY

By J. H. Lloyd
President

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY

By J. H. Lloyd
President

• • • • •

EXHIBIT 9

MISSOURI PACIFIC RAILROAD COMPANY

INCOME ACCOUNT

	Year 1969	Year 1970	Year 1971	Year 1972	Year 1973	January 1 to August 31, 1974
		• • • •	• • •	• • •	• • •	• • •
Net Income	$12,960,547	$12,376,854	$ 7,882,973	$10,936,412	$21,538,889	$32,587,400

RETAINED INCOME — UNAPPROPRIATED

	December 31, 1969	December 31, 1970	December 31, 1971	December 31, 1972	December 31, 1973	August 31, 1974
		• • • •	• • •	• • •	• • •	• • •
Dividends	9,513,134	9,515,665	9,517,665	9,518,915	10,123,130	9,539,166
		• • • •	• • •	• • •	• • •	• • •

THE TEXAS AND PACIFIC RAILWAY COMPANY

INCOME ACCOUNT

	Year 1969	Year 1970	Year 1971	Year 1972	Year 1973	January 1 to August 31, 1974
	•	•	•	•	•	
Net Income	$ 5,779,079	$ 5,458,409	$ 2,573,868	$ 4,017,383	$ 8,355,430	$ 6,146,819

RETAINED INCOME — UNAPPROPRIATED

	December 31, 1969	December 31, 1970	December 31, 1971	December 31, 1972	December 31, 1973	August 31, 1974
	•	•	•	•	•	
Dividends	2,444,440	3,911,104	2,442,705	2,564,402	2,693,995	2,693,995
	•	•	•	•	•	

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EXHIBIT 9a

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY

INCOME ACCOUNT

	Year 1969	Year 1970	Year 1971	Year 1972	Year 1973	January 1 to August 31, 1974
	•	•	•	•	•	
Net Income	$(2,183,541)	$ 395,207	$ 710,283	$ 2,663,395	$ 5,200,475	$ 5,306,512

RETAINED INCOME — UNAPPROPRIATED

	December 31, 1969	December 31, 1970	December 31, 1971	December 31, 1972	December 31, 1973	August 31, 1974
	•	•	•	•	•	•
Dividends				$ 337,232	$ 876,802	$ 843,079
	•	•	•	•	•	•

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EXHIBIT 9b

MISSOURI PACIFIC RAILROAD COMPANY

PRO FORMA INCOME ACCOUNT FOR JANUARY 1 THROUGH AUGUST 31, 1974 GIVING EFFECT TO MERGER

	Missouri Pacific	Texas and Pacific	Chicago & Eastern Illinois	Combined	Adjustments	Note Ref.	Pro-Forma
Net Income	$32,587,400	$ 6,146,819	$ 5,306,512	$44,040,731	$(3,265,688)		$40,775,043

PRO FORMA RETAINED INCOME — UNAPPROPRIATED FOR THE PERIOD JANUARY 1, 1974 THROUGH AUGUST 31, 1974 GIVING EFFECT TO MERGER

	Missouri Pacific	Texas and Pacific	Chicago & Eastern Illinois	Combined	Adjustments	Note Ref.	Pro-Forma
Dividends	9,539,166	2,693,995	843,079	13,076,240	(3,265,688)	(G)	9,810,552

EXHIBIT 9c

I.C.C. FINANCE DOCKETS Nos. 27773 and 27774

EXHIBIT No. 10

PALESTINE AGREEMENT

Between

GUY A. THOMPSON, Trustee,

INTERNATIONAL-GREAT NORTHERN RAILROAD COMPANY, Debtor

and

THE CITY OF PALESTINE, TEXAS,

and

ANDERSON COUNTY, TEXAS.

EXHIBIT "C"

Dated December 21, 1954

[2]

THE STATE OF TEXAS
COUNTY OF ANDERSON

THIS AGREEMENT, made and entered into by and between GUY A. THOMPSON, in his capacity as Trustee (and herein sometimes referred to as "the Trustee") of International-Great Northern Railroad Company, one of the Debtors in Cause No. 6935, pending in the District Court of United States, Eastern Division, Eastern Judicial District of Missouri, and for and in behalf of such Railroad, pursuant to the express authorization of said Court by its Order No. 4443, on the one hand; and the City of Palestine, Texas, a municipal corporation (herein sometimes referred to as "Palestine" or "the City") acting herein by and through its Mayor, Robert H. Pickel, Jr., duly authorized by the City Council of Palestine; and Anderson County, Texas, a political subdivision of the State of Texas (herein sometimes referred to as "Anderson County" or "the County"), acting herein by and through Franklin C. Williams, its County Judge, duly authorized by the County Commissioners' Court of Anderson County, Texas; and certain citizens of Palestine and Anderson County and of the State of Texas who are signatories hereto and who act as representatives of a class composed of all of the citizens thereof having any interest in the the matters which are involved in this Agreement; on the other hand;

WITNESSETH:

I.

As used herein, the following terms shall, unless herein expressly provided otherwise, have the following meanings:

"Missouri Pacific Lines" shall mean the following railroad companies and their respective subsidiaries hereinafter named, to-wit:

[3]

(1) *Missouri Pacific Railway Company* and the following of its subsidiaries, viz.: Boonville, St. Louis & Southern Railway Company; Cairo & Thebes Railroad Company; The Chester & Mount Vernon Railroad Company; Fort Smith Suburban Railway Company; Marion & Eastern Railroad Company; Missouri Pacific Railroad Corporation in Nebraska; and Natchez & Southern Railway Company; such railroads being herein sometimes collectively referred to as "Missouri Pacific";

(2) *New Orleans, Texas and Mexico Railway Company* (herein sometimes called "New Orleans"), and the following of its subsidiaries, viz.: Asherton & Gulf Railway Company; Asphalt Belt Railway Company; The Beaumont, Sour Lake & Western Railway Company; Houston and Brazos Valley Railway Company; Houston North Shore Railway Company; Iberia, St. Mary & Eastern Railroad Company; New Iberia & Northern Railroad Company; Orange & Northwestern Railroad Company; Rio Grande City Railway Company; The St. Louis, Brownsville & Mexico Railway Company; San Antonio Southern Railway Company; San Antonio, Uvalde & Gulf Railroad Company; San Benito & Rio Grande Valley Railway Company; Sugarland Railway Company; (New Orleans and such subsidiaries being herein sometimes referred to collectively as "Gulf Coast Lines"); and

(3) *International-Great Northern Railroad Company* and its subsidiary, Austin Dam & Suburban Railway Company, which railroads are herein sometimes collectively referred to as "International" or the "RAILROAD".

"Reorganization Proceedings" shall mean the proceedings now pending before the Interstate Commerce Commission docketed as Finance Docket 9918, and styled, "Missouri Pacific Railroad Company Reorganization", and the same proceedings now pending in the District Court of the United States, Eastern Division, Eastern Judicial District of Missouri, Docket No. 6935, styled, "In the Matter of Missouri Pacific Railroad Company, et al, Debtors"; and "Reorganization Court" shall mean such last mentioned Court in which the Reorganization Proceedings are pending.

"Office and Shop Employees" shall mean those railroad officers and employees whose jobs are properly classified and reportable under any of the following (and no other) Interstate Commerce Commission classifications, to-wit:

(901) I Executives, Officials and Staff Assistants;
(902) II Professional, Clerical and General;
(904) IV Maintenance of Equipment and Stores;
(905) V Transportation (other than Train, Engine and Yard);
(906) VI(a) Transportation (Yardmaster, Switch Tenders, and Hostlers);

in accordance with the "Rules Governing the Classification of Railroad Employees and Reports of their Service and Compensation" prescribed by the Interstate Commerce Commission by its order dated October 19, 1950, effective January 1, 1951, as the same may be amended from time to time, in which latter events any new classifications of the same or similar jobs shall apply.

"1914 Judgment" means the judgment of the District Court of Cherokee County, Texas, entered January 17, 1914, in Cause No. 6415, styled "Anderson County, et al, v.

International & Great Northern Railway Company" (such judgment being recorded in District Court Minute Book "M", page 191, in the Office of the District Clerk, Cherokee County, Texas), as affirmed by the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, on January 7, 1915 (rehearing denied February 11, 1915), and as finally affirmed by the Supreme Court of the United States on April 15, 1918 (rehearing denied June 3, 1918) after denial of an Application for Writ of Error by the Supreme Court of Texas on April 5, 1916, which provides in part as follows:

> "It is considered, ordered, adjudged and decreed by the Court, that the defendant, International and Great Northern Railway Company, shall forever keep and maintain the general offices, machine shops and roundhouses for the operation of the International and Great

[4]

Northern Railroad in the City of Palestine, in the County of Anderson, in the State of Texas, where the Houston and Great Northern Railroad Company and the International and Great Northern Railroad Company have contracted and agreed to forever keep same, for valuable consideration received.

"It is also considered, ordered, adjudged and decreed by the court that the defendant, International and Great Northern Railway Company be, and it is hereby, perpetually enjoined and restrained from changing the location of the machine shops and roundhouses of the International and Great Northern Railroad as operated by defendant, from the City of Palestine and that the defendant, International and Great Northern Railway Company, be, and it is hereby perpetually enjoined and restrained from keeping or maintaining the general offices of the Vice President

and General Manager, Secretary, Treasurer, Auditor, General Freight Agent, Traffic Manager, General Superintendent, General Passenger Agent, Chief Engineer, Master of Transportation, Fuel Agent, General Claim Agent, Superintendent of Motive Power and Machinery, and Master Mechanic, engaged in the operation of the International and Great Northern Railroad, at any other place than the City of Palestine."

II.

In consideration of the mutual benefits hereof and the other considerations hereinafter mentioned, the parties hereto have AGREED and do hereby AGREE as follows, to-wit:

1. This Agreement shall supersede any prior agreement between the RAILROAD and its predecessors in title, or any of them, on the one hand, and Palestine and Anderson County, and the citizens of Palestine, Anderson County, and the State of Texas, or any of them, on the other hand, regarding the maintenance of general offices, machine shops, and roundhouses at Palestine, Texas, and, as hereinafter provided, the parties hereto shall promptly move the District Court of Cherokee County, Texas, to set aside the 1914 Judgment and to enter a new judgment in accordance with the terms and provisions of this Agreement to take the place of the 1914 Judgment. Said new judgment shall be in substantially the form of the judgment attached hereto as Exhibit "B" hereof.

2. A. Subject to the ensuing terms and provisions hereof, as long as the RAILROAD or any successor in interest or assign thereof shall remain in the railroad business, the RAILROAD shall, each calendar year, actually employ or cause to be employed at Palestine, Texas, during that year, a number of Office and Shop Employees which shall be not less than:

(a) 39.4% of the average number of Office and Shop Employees employed by International at all points for the same year;

and (except as may be otherwise provided herein) which shall be

[5]

not less than:

(b) 20.5% of the total of the average number of Office and Shop Employees employed by International and Gulf Coast Lines, combined, at all points for the same year; and this percentage shall also apply (and then will take the place of the percentages set out in (a) above and in (c) below) in the event International shall ever merge, combine or consolidate solely with the Gulf Coast Lines into one corporation;

and (except as may be otherwise provided herein) which shall be not less than:

(c) 5.1% of the total of the average number of Office and Shop Employees employed by International and Missouri Pacific, combined, at all points for the same year; and this percentage shall also apply (and then will take the place of those set out in (a) and (b) above) in the event International shall ever merge, combine, or consolidate solely with Missouri Pacific into one corporation;

and (except as may be otherwise provided herein) which shall be not less than:

(d) 4.5% of the total of the average number of Office and Shop Employees employed by International and all of the remaining Missouri Pacific Lines, combined, at all points for the same year; and this percentage shall also apply (and then will take the place of the percentages set out in (b) and (c) above) in the event that Gulf Coast Lines and Missouri Pacific shall

merge, combine, or consolidate into one corporation; and this percentage shall also apply (and then exclusively, and in place of the percentages set out in (a), (b) and (c) above), in the event International, Gulf Coast Lines, and Missouri Pacific shall ever merge, combine, or consolidate with each other into one corporation;

and the reference to each railroad in (a), (b), (c) and (d) above shall include its successors and assigns to the extent of the operation of the railroad referred to. The provisions of this part 2.A. and part 2.C. of this Section II are subject to the following express conditions, viz.: (1) If International as reorganized shall emerge from the Reorganization Proceedings as a separate corporation which is not a subsidiary of, and does not have as a subsidiary, any of the other Missouri Pacific Lines (including any successor or successors thereof) and which is in fact independent of any ownership or control (whether by reason of a common ownership of stock or otherwise) by, and does not itself own or control any of the other Missouri Pacific Lines (including the successor or successors thereof) or any subsidiary thereof, then subparagraphs (b), (c) and (d) above shall have no application so long (and only so long) as International shall operate as such an independent railroad; (2) If International as reorganized shall emerge from the Reorganization Proceedings merged with Gulf Coast Lines into one corporation which is not a subsidiary of, and does not have as a subsidiary, any of the other Missouri Pacific Lines (including the successor or

[6]

successors thereof) and which is in fact independent of any ownership or control (whether by reason of a common ownership of stock or otherwise) by, and does not itself own or control, any of the other Missouri Pacific Lines (including the successor or successors thereof) or any subsidiary thereof, then (as provided in subparagraph (b) above) subparagraphs (a) and (c) above shall no longer apply, and it is further agreed, neither shall subparagraph (d) above have any application so long (and only so long) as such merger of International and Gulf Coast Lines shall operate as such an independent railroad; (3) If International as reorganized shall emerge from the Reorganization Proceedings merged with Missouri Pacific into one corporation which is not a subsidiary of, and does not have as a subsidiary, any of the other Missouri Pacific Lines (including the successor or successors thereof) and which is in fact independent of any ownership or control (whether by reason of a common ownership of stock or otherwise) by, and does not itself own or control any of the other Missouri Pacific Lines (including the successor or successors thereof) or any subsidiary thereof, then (as provided in subparagraph (c) above) subparagraphs (a) and (b) above shall no longer apply and, it is further agreed, neither shall subparagraph (d) above have any application so long (and only so long) as such merger of International and Missouri Pacific shall operate as such an independent railroad; and (4) Subject to the three (3) preceding conditions, if any of the Missouri Pacific Lines (including the successor or successors thereof except a successor constituting a merger with International) other than International or its successor shall emerge from the Reorganization Proceedings as a separate corporation which is not a subsidiary of, and does not have as a subsidiary, any of the other Missouri Pacific Lines (including the successor or successors thereof) and which is in fact independent of any ownership or control (whether by reason of a common ownership of stock or otherwise) by, and does not itself own or control any of the other Missouri Pacific Lines (including the suc-

cessor or successors thereof) or any subsidiary thereof, then the Office and Shop Employees of such railroad shall be excluded from any calculation of percentages provided for in this part 2.A. and in part 2.C. of this Section II of this Agreement so long (and only so long) as such railroad shall operate as such an independent railroad. Subject to the foregoing it is further provided that in the event that: (i) International (or its successor) or any of the other Missouri Pacific Lines (including the successor or successors thereof) shall ever merge, combine or consolidate with any of the other Missouri Pacific Lines, or with any other railroad or railroads; and (ii) if subsections (b), (c) and (d) above, or any of them, do not expressly apply thereto, then the percentages set out in (a), (b), (c) and (d) above, or the one or more of them which would be affected thereby, shall be recalculated and redetermined by multiplying each percentage so affected by a fraction, the numerator of which is the average annual number of Office and Shop Employees employed by the railroad or railroads, in question (i.e., other than the railroad or railroads with which the merger, combination, or consolidation is made) during the five (5) years immediately preceding the year in which the merger, combination, or consolidation occurs, and the denominator of which is a sum equal to the numerator plus the average annual number of Office and Shop Employees employed by the railroad or railroads with which the merger, combination, or consolidation is made during the same five (5) year period; and thereafter beginning the effective date

[7]

of such merger, combination, or consolidation, the percentage or percentages obtained as the product or products of such multiplication shall be applied (in so far as the merged,

combined, or consolidated railroad is concerned) until a new or different merger, combination, or consolidation is made, in which event there shall be another recalculation and redetermination under the provisions hereof. By way of example and not by way of limitation, the following hypothetical illustrations are given: If there should be a merger of International with The St. Louis, Brownsville and Mexico Railway Company, and if the five (5) year averages of Office and Shop Employees should be 2,000 for International and 1,000 for The St. Louis, Brownsville and Mexico Railway Company, then the 39.4% set out in subparagraph (a) above would be multiplied by 2/3rds, and thus reduced to 26.3%. Likewise, if Missouri Pacific Lines, or their successor, should merge with Railroad "X" (not now a part of Missouri Pacific Lines), and if the five (5) year averages of Office and Shop Employees should be 18,000 for Missouri Pacific Lines and 36,000 for Railroad "X", then the 4.5% set out in subparagraph (d) above would be multiplied by 1/3rd, and thus be reduced to 1.5%. In order to illustrate the manner in which the agreed percentages set out in (a), (b), (c) and (d) above were determined there is attached hereto and made a part hereof as Exhibit "A", a schedule prepared by the RAILROAD showing the number of Office and Shop Employees at Palestine and total International (shown as "I-GN Railroad") and total International and Gulf Coast Lines combined (shown as "I-GN plus G.C.L.") and total Missouri Pacific plus International (shown as "MoPac. plus I-GN") and total Missouri Pacific Lines (shown as "Missouri Pacific Lines") for the years 1924-53, inclusive, and for the first six (6) months of 1954.

2.B. It is further agreed that the total payroll of Office and Shop Employees at Palestine for any calendar year shall never be less than the product of the minimum num-

ber of Office and Shop Employees required to be employed by the RAILROAD at Palestine for that year under the applicable provisions of parts 2.A. or 2.C. hereof multiplied by the average per capita compensation of all of the Office and Shop Employees used under parts 2.A. or 2.C., as the case may be, in determining the minimum number of Office and Shop Employees required to be employed at Palestine for the year.

2.C. The RAILROAD shall maintain at Palestine, Texas, the number and payroll of Office and Shop Employees required by parts 2.A. and 2.B. of this Section II of this Agreement, unless for any year the RAILROAD shall be excused from such compliance by other provisions of this Agreement. In this connection the RAILROAD has represented that it is impractical for the RAILROAD to begin compliance with the percentage provisions of part 2.A. immediately upon the effective date of this Agreement, and it is therefore agreed that for the first twelve (12) calendar months after such effective date, the RAILROAD'S employment percentage obligations shall be as follows: Beginning the first day of the seventh (7th) calendar month after this Agreement is executed and has become fully effective and continuing for six (6) calendar months thereafter, in place of the percentages set out in subparagraphs (a), (b), (c) and (d) of part 2.A. of this Section II of this Agreement, the following minimum percentages shall apply, viz.:

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(a) — 38.4%
(b) — 20.0%
(c) — 4.9%
(d) — 4.4%

Upon compliance with such percentages for the last six (6) months of the first twelve (12) months from and after the effective date hereof, it shall be conclusively deemed that the obligations of the RAILROAD for all of said first twelve (12) months period, are being performed to the full extent required by the provisions of this Agreement if the applicable of such percentage requirements (substituted for those set out in (a), (b), (c) and (d) of part 2.A.) are met. Compliance with the above shall relieve the RAILROAD of the obligation of complying with the percentages set forth in part 2.A. during, and only during, the first twelve (12) months following the effective date of this agreement.

2.D. The actual number of Office and Shop Employees at Palestine for any year shall be calculated by adding together the twelve (12) sums representing the actual number of such Employees on the pay roll for each month of the year, and dividing the result by twelve (12). Each annual average total number of Office and Shop Employees for each railroad shall be determined by the average of twelve (12) monthly employee counts which shall be made by the RAILROAD once during each month of each calendar year, each such count to be of the total number of Office and Shop Employees in service as of a day reasonably near the middle of the month, in accordance with regulations of the Interstate Commerce Commission. Within a reasonable time after each monthly employee count is made of the Office and Shop Employees of each railroad affected by the provisions of parts 2.A. and 2.C. of this Section II of this Agreement, full particulars thereof shall be obtained and furnished Palestine and Anderson County by the RAILROAD. Likewise, within a reasonable time after the end of each calendar year (and in any event prior to the following July 1st), the RAILROAD shall furnish Palestine and

Anderson County all information necessary for the City and County to determine whether there has been compliance by the RAILROAD with the provisions of part 2.B. of this Section II hereof during the preceding calendar year. Representatives of the City and County shall have the right at all reasonable times during business hours, after first giving the RAILROAD reasonable notice in advance thereof, to audit, inspect and copy records of the RAILROAD relating to the subject matter of this Agreement.

3. So long as the RAILROAD shall in good faith comply with the provisions of this Agreement, it shall not be necessary that the RAILROAD keep and maintain at Palestine, Texas, any one or more of the following officials of International or of any successor of International: President, Vice-President and General Manager, Secretary, Treasurer, Auditor, General Freight Agent, Traffic Manager, General Superintendent, General Passenger and Ticket Agent, Chief Engineer, Master of Transportation, Fuel Agent, General Claim Agent, Superintendent of Motive Power and Machinery, and Master Mechanic; nor any of its general offices, machine shops and roundhouses.

4. The RAILROAD shall promptly notify the City and County, and the City and County shall promptly notify the RAILROAD, of any proceeding to which any of them or their successors may be a

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party or may have knowledge, hereafter filed or to be filed with the Railroad Commission of Texas or with the Interstate Commerce Commission or with other governmental authority, State or Federal, having jurisdiction in railroad matters, or in any Court, concerning or which might in any substantial way affect the rights of the RAILROAD and

the City and County and their citizens under this Agreement; and in the event any such proceeding shall be filed, the RAILROAD and the City and County shall cooperate with each other in enforcing the provisions of this Agreement without diminution of any party's rights hereunder.

5. No waiver by the City and County, or either of them, of all or any part of this Agreement, and no status allowed to exist or course of action allowed to continue, either with or without knowledge of officials of the City and County, and no delay on the part of the City and County, or either of them, in exercising any rights available to such parties hereunder shall operate as a waiver of any right of the City and County to insist on full compliance with this Agreement, or in any way prejudice the City and County in enforcing the terms and provisions hereof.

6. In the event the RAILROAD shall be rendered unable wholly or in part by *force majeure* to carry out its obligations under this Agreement, it is agreed that upon its giving notice and full particulars of such *force majeure* in writing to the City and County as soon as possible after the occurrence of the cause relied on, then the obligations of the RAILROAD so far as they are affected by such *force majeure*, shall be suspended during the continuance of any inability so caused but for no longer period, and such cause shall as far as possible be remedied with all reasonable dispatch. The term "*force majeure*" as employed herein shall include acts of God, strikes, lockouts, or other industrial disturbances, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests and restraints of governments and people, civil disturbances, and any other causes of a similar nature not within the control of the RAILROAD and which by the exercise of due diligence it is unable to prevent or overcome. It is agreed that

the settlement of strikes, lockouts, or other industrial disturbances shall be entirely within the discretion of the RAILROAD, and the above requirement that any *force majeure* shall be remedied with reasonable dispatch shall not require the RAILROAD to settle strikes, lockouts, or labor disputes by acceding to the demands of an opposing party or parties when such course is inadvisable in the discretion of the RAILROAD.

7. If the RAILROAD shall for any reason not excused by some provision of this Agreement fail to perform in accordance with the terms of this Agreement in good faith to the full extent herein required, the City and County may:

(a) Require the specific performance by the RAILROAD of its obligations hereunder; or,

(b) Notify the RAILROAD in writing of the intention of the City and County to rescind this new agreement unless the RAILROAD shall, within a reasonable time after receipt of such notice, cure any defaults specifically brought to its attention in such written notice in

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a manner reasonably satisfactory to the City and County; and upon the RAILROAD'S failure to do so within such period, the City and County may apply to the proper court for a hearing to determine whether any of said defaults exist as claimed and constitute an unexcused breach of this Agreement and the new judgment based thereon, and if the Court shall find that the RAILROAD has defaulted as claimed and that such defaults, or any of them, do constitute an unexcused breach of this Agreement and the new judgment based thereon, the City and County shall be entitled to rescind this Agreement and to have the Court enter an Order reinstating the 1914 Judgment unaffected by the

provisions of this Agreement; and upon the entry of such an Order such 1914 Judgment shall again be in full force and effect and may be enforced against the RAILROAD (or its successors and assigns), and the parties hereto shall thereupon be restored to their original positions and respective rights and obligations as they existed immediately prior to the execution of this Agreement and the entry of the new judgment based thereon, and neither the elapsing period of time nor anything that occurred under and pursuant to this Agreement and the new judgment based thereon shall in anywise prejudice the rights to any party hereto. If for any reason the City and County shall not apply to the Court for such a determination and Order of the Court reinstating the 1914 Judgment, or if, after such an application is filed, the Court shall for any reason decline to enter such an Order as requested by the City and County, this Agreement and the new judgment based thereon shall continue in full force and effect as though no such notice of intention to rescind this contract had been given the RAILROAD by the City and County;

(c) Either concurrently, independently, or cumulative of the foregoing, exercise or enforce any other right or remedy which may be available to the City and County and their citizens under the then existing circumstances; but in no event shall the RAILROAD, its successor or successors, be subjected to any suit for any money damages or penalties or forfeitures, if any, arising or claimed to have arisen by reason of any alleged non-compliance with the 1914 Judgment on the part of the RAILROAD occurring prior to the date hereof, or occurring after the date hereof but prior to reinstatement of the 1914 Judgment as provided in paragraph (b) last above.

III.

It is agreed that this Agreement and the new Judgment to be entered in place of the 1914 Judgment as provided in

paragraph 1. of Section II of this Agreement shall have the same status under the Federal Bankruptcy Act as the 1914 Judgment and the contract and agreement mentioned therein; and nothing contained in this Agreement or in such new Judgment shall in any way diminish the right of Palestine and Anderson County or of the RAILROAD under Section 77(n) or other provisions of such Federal Bankruptcy Act

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except as may be expressly provided herein or in such new Judgment.

IV.

As part of the consideration for this Agreement:

1. The Trustee agrees, within a reasonable time after the entry of the new Judgment provided for in Section V hereof (if he has not theretofore done so), to: (a) recondition, remodel or replace such shop buildings at Palestine as may be necessary to provide proper and adequate shop facilities for the personnel of the RAILROAD employed and to be employed at Palestine, Texas, under the terms of the Agreement; (b) to install additional freight car repair facilities; and (c) to provide such other facilities and equipment as may be necessary for the mechanical and other work to be performed at the Palestine shops. The Trustee shall have the right to dismantle and remove any shop buildings and other facilities which are now or later become obsolete and no longer required for such work.

2. The Trustee recognizes the desirability, in the operation of Missouri Pacific Lines, of having a modern office building at Palestine, Texas, and, subject to approval of the Reorganization Court, agrees to expend approximately $200,000.00 for the construction of such a building on land

owned by International at Palestine, Texas. Once such approval is obtained, such construction shall be begun and completed with due diligence.

V.

(a) This Agreement is subject to and conditioned upon the approval of the District Court of Cherokee County, Texas, by the entry by such Court of a new judgment to take the place of the 1914 Judgment in substantially the form of judgment attached hereto and made a part hereof as Exhibit "B"; and upon execution and delivery of this Agreement, the parties hereto agree to promptly move the District Court of Cherokee County, Texas, to enter a new judgment in substantially the form of judgment attached hereto as Exhibit "B" hereof. This Agreement shall become fully effective upon the entry of such a judgment.

(b) If the City and County shall elect to file an application with the Interstate Commerce Commission to obtain an approval by such Commission of this Agreement and the new Judgment to be entered by the District Court of Cherokee County, Texas, the City and County shall so notify the RAILROAD in writing and upon receipt of any such notice, the RAILROAD shall join with the City and County in presenting and seeking approval of such application and the RAILROAD shall cooperate with the City and County in all reasonable and proper ways with respect thereto.

VI.

All notices required to be given under any of the provisions of this Agreement shall be in writing and shall be conclusively presumed to have been communicated to the party to whom such

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notice is to be given when the party giving such notice deposits a properly stamped envelope containing such notice in the United States mail, first class, addressed as follows:

The Mayor
City of Palestine
Palestine, Texas

The County Judge
Anderson County
Palestine, Texas

Guy A. Thompson, Trustee
International-Great Northern Railroad Company
Missouri Pacific Building
13th at Olive Streets
St. Louis, Missouri

The address of any party hereto may be changed by such party giving each of the other parties, notice of such change of address.

VII.

The terms of this Agreement shall extend to the successors and assigns of the parties hereto. Until final termination of the Reorganization Proceedings, the Trustee shall perform all obligations of the RAILROAD and of the Trustee hereunder pursuant to orders of the aforesaid Reorganization Court, and thereafter, the RAILROAD or its successor or successors, shall perform such obligations; and this Agreement shall extend to and be binding upon the Reorganization Managers appointed pursuant to any final Plan of Reorganization of International, and shall be binding upon each person, corporation, or other entity which succeeds to the interest, properties, and position of International-Great Northern Railroad Company.

IN WITNESS WHEREOF, Guy A. Thompson, as Trustee of International-Great Northern Railroad Company pursuant to authorization of the Reorganization Court, has executed this Agreement; and the City of Palestine, Texas, has caused this Agreement to be executed in its behalf by its Mayor, Robert H. Pickel, Jr., and to be countersigned and attested by its City Secretary, J. G. Hardgrave, each thereunto duly authorized by the City Council of the City of Palestine; and Anderson County, Texas, has caused this Agreement to be executed in its behalf by its County Judge, Franklin C. Williams, and to be attested by its County Clerk, Cecil W. James, each thereunto duly authorized by order of the County Commissioners' Court of Anderson County, Texas, and the undersigned citizens of Palestine and Anderson County and of the State of Texas execute this Agreement as representatives of a class composed of all the citizens thereof having any interest in the matters which are involved in this Agreement; in several counterpart originals, all as of the 21st day of December 1954.

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/s/ GUY A. THOMPSON
Guy A. Thompson, Trustee
International-Great Northern
Railroad Company

CITY OF PALESTINE,
TEXAS
/s/ By ROBERT H. PICKEL, JR.
Robert H. Pickel, Jr.
Mayor

ANDERSON COUNTY,
TEXAS
/s/ By FRANKLIN C. WILLIAMS
Franklin C. Williams,
County Judge

/s/ H. V. HAMILTON
H. V. Hamilton

/s/ H. I. MEYERS
H. I. Meyers

/s/ C. L. HUFSMITH
C. L. Hufsmith

/s/ EUGENE FISH
Eugene Fish

/s/ S. S. STAFFORD
S. S. Stafford

/s/ LAMAR HAMILTON
Lamar Hamilton

/s/ C. W. HANKS
C. W. Hanks

/s/ K. A. ANDERSON
K. A. Anderson

/s/ J. V. MURDAUGH
J. V. Murdaugh

/s/ N. C. WOOLVERTON
N. C. Woolverton

Countersigned and
Attested:
/s/ J. G. HARDGRAVE
J. G. Hardgrave
City Secretary of
Palestine, Texas

Attest:
/s/ CECIL W. JAMES
County Clerk of
Anderson County, Texas
By Dora Schmidt, Deputy

Number of Office and Shop Employees whose jobs are properly classified by and reportable to the Interstate Commerce Commission as:

(901) I Executive Officials and Staff Assistants
(902) II Professional, Clerical and General
(904) IV Maintenance of Equipment and Stores
(905) V Transportation (other than Train, Engine and Yard)
(906) VI(a) Transportation (Yardmasters, Switch Tenders and Hostlers)

for the year 1910, and the Years 1924 to 1953, inclusive, plus six months of 1954.

	PALESTINE	I-GN RAILROAD		I-GN plus G.C.L.		MoPac. plus I-GN		MISSOURI PACIFIC LINES	
Year	Number of Employes	Number of Employes	Palestine Percent	Number of Employes	Palestine Percent	Number of Employes	Palestine Percent	Number of Employes	Palestine Percent
	NOTE "A"			NOTE "B"		NOTE "B"		NOTE "B"	
1910*	964	2,499	38.6	*	*	*	*	*	*
		NOTE "B"							
1924	1,021	2,769	36.9	4,660	21.9	23,933	4.3	25,824	4.0
1925	1,024	2,648	38.7	4,812	21.3	24,253	4.2	26,417	3.9
1926	1,010	2,657	38.0	5,046	20.0	23,755	4.3	26,144	3.9
1927	925	2,593	35.7	4,995	18.5	22,243	4.2	24,645	3.8
1928	912	2,658	34.3	4,985	18.3	21,543	4.2	23,870	3.8
1929	963	2,719	35.4	5,070	19.0	22,144	4.3	24,495	3.9
1930	773	2,539	30.4	4,874	15.9	19,739	3.9	22,074	3.5
1931	852	2,577	33.1	4,662	18.3	16,846	5.1	18,931	4.5
1932	618	1,911	32.3	3,514	17.6	13,239	4.7	14,842	4.2
1933	717	2,014	35.6	3,466	20.7	13,794	5.2	15,246	4.7

Year	PALESTINE Number of Employes	I-GN RAILROAD Number of Employes	I-GN RAILROAD Palestine Percent	I-GN plus G.C.L. Number of Employes	I-GN plus G.C.L. Palestine Percent	MoPac. plus I-GN Number of Employes	MoPac. plus I-GN Palestine Percent	MISSOURI PACIFIC LINES Number of Employes	MISSOURI PACIFIC LINES Palestine Percent
	NOTE "A"			NOTE "B"		NOTE "B"		NOTE "B"	
1934	721	2,058	35.0	3,661	19.7	14,180	5.1	15,783	4.6
1935	721	2,032	35.5	3,682	19.6	14,448	5.0	16,098	4.5
1936	772	2,149	35.9	3,887	19.9	15,293	5.0	17,031	4.5
1937	766	2,146	35.7	3,946	19.4	15,567	4.9	17,367	4.4
1938	658	1,968	33.4	3,668	17.9	13,959	4.7	15,659	4.2
1939	666	1,911	34.9	3,575	18.6	13,998	4.8	15,662	4.3
1940	625	1,803	34.7	3,395	18.4	13,693	4.6	15,285	4.1
1941	629	1,951	32.2	3,632	17.3	14,829	4.2	16,510	3.8
1942	717	2,188	32.8	4,151	17.3	16,794	4.3	18,757	3.8
1943	793	2,409	32.9	4,658	17.0	18,698	4.2	20,947	3.8
1944	850	2,556	33.3	5,010	17.0	19,064	4.5	21,518	4.0
1945	924	2,630	35.1	5,080	18.2	19,054	4.8	21,504	4.3
1946	934	2,649	35.3	5,133	18.2	18,909	4.9	21,393	4.4
1947	860	2,575	33.4	5,032	17.1	19,226	4.5	21,683	4.0
1948	851	2,493	34.1	4,872	17.5	18,993	4.5	21,372	4.0
1949	794	2,225	35.7	4,271	18.6	15,172	5.2	17,218	4.6
1950	820	2,206	37.2	4,706	17.4	17,949	4.6	20,449	4.0
1951	924	2,197	42.1	4,927	18.8	18,810	4.9	21,540	4.3
1952	830	2,056	40.4	4,617	18.0	18,132	4.6	20,693	4.0
1953	801	2,029	39.5	4,548	17.6	18,072	4.4	20,591	3.9
1954(1)	711	1,734	41.0	4,100	17.3	15,614	4.6	17,980	4.0
1924 to 6/30/54 Total	25,182	71,050		136,635		551,943		617,528	
Average	812	2,292	35.4	4,408	18.4	17,805	4.6	19,920	4.1

Year	PALESTINE Number of Employes	I-GN RAILROAD Number of Employes	I-GN RAILROAD Palestine Percent	I-GN plus G.C.L. Number of Employes	I-GN plus G.C.L. Palestine Percent	MoPac. plus I-GN Number of Employes	MoPac. plus I-GN Palestine Percent	MISSOURI PACIFIC LINES Number of Employes	MISSOURI PACIFIC LINES Palestine Percent
	NOTE "A"			NOTE "B"		NOTE "B"		NOTE "B"	
Agreed Percentage 1st Year			38.4		20.0		4.9		4.4
Agreed Percentage Thereafter			39.4		20.5		5.1		4.5

* 1910 data for total number of I-GN Employees is based on information shown on page 91 of the 1910 Annual Report to the Interstate Commerce Commission, excluding General Officers, Enginemen, Firemen, Conductors, Other Trainmen, Section Foremen and Other Trackmen. General Officers were excluded as the location of their offices is unknown and no officer payroll giving this information is available.

(1) First six months of 1954.

NOTE "A" — The number shown is the 12 months average of the number of Office and Shop Employees on the payroll at Palestine, Texas, in accordance with the Rules Governing the Classification of Railroad Employees and Reports of their Service and Compensation Prescribed by the Interstate Commerce Commission, effective January 1, 1951.

NOTE "B" — The number shown is the 12 months average of the number of Office and Shop Employees in service as of the 15th day of the month, except when it falls on Saturday, Sunday or a holiday, in which case the count is made as of the last preceding business day in accordance with the Rules Governing the Classification of Railroad Employees and Reports of their Service and Compensation Prescribed by the Interstate Commerce Commission, effective January 1, 1951.

(Revised 11/13/54)

EXHIBIT "B"

Exhibit "B" is not here printed, but as slightly modified by the Court and entered of record March 2, 1955 is here printed.

EXHIBIT "B"

NO. 6415

ANDERSON COUNTY, ET AL.

v.

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY
IN THE DISTRICT COURT OF CHEROKEE COUNTY, TEXAS

1955 JUDGMENT

On the 7th day of February, 1955, there came on to be heard and considered the Motion to set aside the 1914 Judgment and enter in lieu thereof a new Judgment, filed in this Cause December 31, 1954, by Anderson County, Texas, the City of Palestine, Texas, H. V. Hamilton, H. I. Myers, C. L. Hufsmith, Eugene Fish, S. S. Stafford, Lamar Hamilton, C. W. Hanks, K. A. Anderson, J. V. Murdaugh, and N. C. Woolverton, resident citizens of Palestine, Anderson County, Texas (the foregoing being herein sometimes referred to as the "City of Palestine, et al. Parties"); International-Great Northern Railroad Company, and Guy A. Thompson, Trustee of International-Great Northern Railroad Company (the latter two parties being herein sometimes referred to as the "Railroad Parties"); all of such parties being represented in Court by and through their respective attorneys of record; and,

It appearing to the Court that this Cause was originally filed as Cause No. 8589 in the District Court of Anderson County, Texas, and upon motion to change the venue being filed by the Defendant railroad company, the cause was removed to the District Court of Cherokee County, Texas, and tried by this Court beginning January 7, 1914, and

ending January 17, 1914; and that on such last mentioned date a final judgment was entered by this Court in accordance with the findings of the jury (such judgment being herein sometimes referred to as the "1914 Judgment", same being recorded in Minute Book "M", page 191 in the Office of the District Clerk, Cherokee County, Texas), and that upon the appeal of the 1914 Judgment by the defendant railroad company, same was finally affirmed in all respects by the United States Supreme Court; and

It appearing to the Court that Anderson County, Texas, and the City of Palestine, Texas, Movants herein, are two of the original plaintiffs in this cause; and that International-Great Northern Railroad Company, a Texas corporation, is the same corporation as "International & Great Northern Railway Company", the original defendant in this Cause, such corporation having changed its corporate name on August 21, 1922 to "International-Great Northern Railroad Company", by Charter Amendment; and,

It appearing to the Court that on March 31, 1933, Missouri Pacific Railroad Company filed a petition in the United States District Court for the Eastern Judicial District of Missouri, Eastern Division, Cause No. 6935, styled, "In the Matter of Missouri Pacific Railroad Company, Debtor", for reorganization pursuant to the provision of Section 77 of the Federal Bankruptcy Act; and on the same day a subsidiary of such railroad

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company, New Orleans, Texas and Mexico Railway Company, and its subsidiary, International-Great Northern Railroad Company, each filed petitions in the same proceedings also praying for reorganization as a part of or in connection with any plan of reorganization adopted for

Missouri Pacific Railroad Company; and that on June 22, 1933, L. W. Baldwin and Guy A. Thompson were appointed temporary Trustees of the properties of such Debtors in said Cause No. 6935; and that by order of such Federal District Court dated July 25, 1933, their appointment was here made permanent; and that thereafter by order of such court entered December 26, 1935, the Court accepted said Baldwin's resignation as Co-Trustee and continued Guy A. Thompson as sole Trustee; that said proceedings are still pending, and that Guy A. Thompson is still sole Trustee of all Debtors therein; and that said Trustee has been authorized by the Federal District Court appointing him to intervene in this proceeding and he has so intervened as Trustee for and in behalf of International-Great Northern Railroad Company, and such Federal District Court and its said Trustee have consented to the jurisdiction of this Court in so far as the matters involved in this proceeding are concerned; and,

It appearing to the Court that H. V. Hamilton, H. I. Myers, C. L. Hufsmith, Eugene Fish, S. S. Stafford, Lamar Hamilton, C. W. Hanks, K. A. Anderson, J. V. Murdaugh, and N. C. Woolverton, residents of Palestine, Anderson County, Texas, have intervened as plaintiffs herein and as representatives of a class composed of all the citizens in this State and particularly of Anderson County, Texas, having any interest in the matters involved in this proceeding; and,

It further appearing to the Court that Haile Perry, W. M. Presley, S. D. Robinson, Henry Leon, J. C. Dickey, B. B. Campbell, Ben Kelly, and Oliver Davis (herein sometimes referred to as "Opposing Interveners"), also residents of Palestine, Anderson County, Texas, have also intervened herein as plaintiffs and as representatives of a class composed of all citizens of the State of Texas, and particularly

of Anderson County, Texas, having any interest in maintaining inviolate and without change or modification the judgment of this Court rendered in this Cause on January 17, 1914, and the rights, interest and effect of the said judgment at the time it was pronounced, such parties being present in Court in person or by and through their respective attorneys of record; and it also appearing to the Court that the said Opposing Interveners as well as the citizens who have joined with the City of Palestine and Anderson County, Texas, purport to sue herein as successors of the citizens who joined in this suit originally and were parties to the judgment entered in 1914, to-wit: George A. Wright, J. W. Ozment, A. L. Bowers, John R. Hearne, Z. L. Robinson, E. L. Link, R. C. Sewell, John M. Colley, and P. H. Hughes, all of whom are now deceased; and,

It further appearing to the Court that the Attorney General of the State of Texas has filed a disclaimer herein in behalf of the State of Texas and the Railroad Commission of Texas; and,

All parties having announced in Open Court their agreement that the Court should hear the evidence in support of and in opposition to the Motion for New Judgment before ruling on the Motions of the City of Palestine, et al. Parties and of the Railroad Parties to Strike the Intervention of Opposing Inter-

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veners and before ruling on the Special Exceptions contained in the pleadings of any party; and,

It appearing to the Court that all parties having any interest in the matters here involved were (and are) before

the Court; and all parties having announced ready to proceed before the Court without intervention of a jury (subject to the Motions to Strike the Intervention of the Opposing Interveners and subject to the Special Exceptions contained in the pleadings of the parties), the Court then proceeded to hear evidence in support of and in opposition to the Motion for New Judgment, the trial proceeding from day to day from February 7th until February 9, 1955, and on the last mentioned date, before oral argument, the attorneys for City of Palestine, et al. Parties announced in Open Court that they would not urge their Motion to Strike the Intervention of Opposing Interveners and that such Parties were willing to have the Court overrule such Motion; and the Court then did so, and also overruled the Motion of the Railroad Parties to Strike the Intervention of Opposing Interveners, to which latter action of the Court the Railroad Parties then duly excepted; and,

After hearing oral argument by the attorneys for all parties, the Court announced that it would take the matters at issue under advisement and would then notify the parties of the Court's decision with respect thereto; and the Court having considered the evidence and the arguments of counsel, is of the opinion and FINDS, and therefore ORDERS, ADJUDGES AND DECREES, as follows, to-wit:

I. (a)

The Motions of the City of Palestine, et al. Parties and of the Railroad Parties to Strike the Intervention of Opposing Interveners are in each and all respects overruled; to which action of the Court Guy A. Thompson, Trustee of International-Great Northern Railroad Company, Debtor, and said Railroad Company, each duly excepted.

I. (b)

All Special Exceptions contained in the pleadings of any party are hereby, in all respects, overruled; to which action of the Court, so far as their Special Exceptions are concerned, Opposing Interveners duly excepted.

I. (c)

The Court finds that conditions in the railroad business have changed since the original 1914 Judgment was entered; and the Court further finds that by reason of such changed conditions, the parties joining in the Motion for New Judgment have entered into a new Agreement (superseding the Agreement referred to in the 1914 Judgment), dated December 21, 1954, providing that the Defendant Railroad Company and its Trustee (upon the entry by this Court of a judgment based on such new agreement) shall be obligated to keep and maintain at Palestine, Texas, a

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definitely ascertainable number of certain classes of railroad employees in place of the railroad's obligation under the 1914 Judgment (and the agreement referred to therein) to keep and maintain certain officials and the general offices, machine shops and roundhouses of the defendant railroad at Palestine, Texas; a copy of such agreement being attached to the Motion for New Judgment as Exhibit "A" thereof; and it appearing that such new agreement is expressly subject to the approval of this Court evidenced by its entry of a new judgment in this Cause in substantially the form of judgment attached to and made a part of such new agreement as Exhibit "B" thereof; and

The Court being of the opinion, based on the evidence and argument of counsel, that the Court should grant the Motion for New Judgment, it is therefore ORDERED that such Motion be and the same is hereby GRANTED, and the objections of Opposing Interveners with respect thereto be and same are hereby OVERRULED, and such new agreement dated December 21, 1954, by and between the parties filing the the Motion for New Judgment is hereby approved, and in connection therewith, IT IS FURTHER ORDERED, ADJUDGED AND DECREED as follows, to-wit:

As used in this Judgment, the following terms shall, unless herein expressly provided otherwise, have the following meanings:

"Palestine" or "the City" shall mean the City of Palestine, Texas; "Anderson County" or "the County" shall mean Anderson County, Texas; and "the Trustee" shall mean Guy A. Thompson in his capacity as Trustee of International-Great Northern Railroad Company, Debtor in Cause No. 6935, pending in the District Court of the United States, Eastern Division, Eastern Judicial District of Missouri.

"Missouri Pacific Lines" shall mean the following railroad companies and their respective subsidiaries hereinafter named to-wit:

(1) *Missouri Pacific Railroad Company* and the following of its subsidiaries, viz.: Boonville, St. Louis & Southern Railroad Company; Cairo & Thebes Railroad Company; The Chester & Mount Vernon Railroad Company; Fort Smith Suburban Railway Company; Marion & Eastern Railroad Company; Missouri Pacific Railroad Corporation in Nebraska; and Natchez & Southern Railway Company; such railroads being herein sometimes collectively referred to as "Missouri Pacific";

(2) *New Orleans, Texas and Mexico Railway Company* (herein sometimes called "New Orleans"), and the following of its subsidiaries, viz.: Asherton & Gulf Railway Company; Asphalt Belt Railway Company; The Beaumont, Sour Lake & Western Railway Company; Houston and Brazos Valley Railway Company; Houston North Shore Railway Company; Iberia, St. Mary & Eastern Railroad Company; New Iberia & Northern Railroad Company; Orange & Northwestern Railroad Company; Rio Grande City Railway Company; The St. Louis, Brownsville & Mexico Railway Company; San Antonio Southern Railway Company; San Antonio, Uvalde & Gulf Railroad Company; San Benito & Rio Grande Valley Railway Company;

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Sugarland Railway Company; (New Orleans and such subsidiaries being herein sometimes referred to collectively as "Gulf Coast Lines"); and,

(3) *International-Great Northern Railroad Company* and its subsidiary, Austin Dam & Suburban Railway Company being herein sometimes collectively referred to as "International" or the "RAILROAD".

"Reorganization Proceedings" shall mean the proceedings now pending before the Interstate Commerce Commission docketed as Finance Docket 9918, and styled, "Missouri Pacific Railroad Company Reorganization", and the same proceedings now pending in the District Court of the United States, Eastern Division, Eastern Judicial District of Missouri, Docket No. 6935, styled, "In the Matter of Missouri Pacific Railroad Company, et al., Debtors"; and "Reorganization Court" shall mean such last mentioned Court in which the Reorganization Proceedings are pending.

"Office and Shop Employees" shall mean those railroad officers and employees whose jobs are properly classified

and reportable under any of the following (and no other) Interstate Commerce Commission classifications, to-wit:

(901)	I	Executives, Officials and Staff Assistants;
(902)	II	Professional, Clerical and General;
(904)	IV	Maintenance of Equipment and Stores;
(905)	V	Transportation (other than Train, Engine and Yard);
(906)	VI(a)	Transportation (Yardmasters' Switch Tenders, and Hostlers);

in accordance with the "Rules Governing the Classification of Railroad Employees and Reports of their Service and Compensation" prescribed by the Interstate Commerce Commission by its order dated October 19, 1950, effective January 1, 1951, as the same may be amended from time to time, in which latter events any new classifications of the same or similar jobs shall apply.

II.

1. The 1914 Judgment is hereby set aside and superseded by this Judgment; and this Judgment and the aforesaid new Agreement dated December 21, 1954, shall also supersede any prior agreement on which such 1914 Judgment may have been based between the RAILROAD and its predecessors in title, or any of them, on the one hand, and Palestine, Anderson County, and the citizens of Palestine, Anderson County, and the State of Texas, or any of them, on the other hand, regarding the maintenance of general offices, machine shops, and roundhouses at Palestine, Texas.

2. A. Subject to the ensuing terms and provisions hereof, as long as the RAILROAD or any successor in interest or assign thereof shall remain in the railroad business, the RAILROAD shall, each calendar year, actually employ or cause to be employed at Palestine, Texas, during that year, a number of Office and Shop Employees which shall be not less than:

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(a) 39.4% of the average number of Office and Shop Employees employed by International at all points for the same year;

and (except as may be otherwise provided herein) which shall be not less than:

(b) 20.5% of the total of the average number of Office and Shop Employees employed by International and Gulf Coast Lines, combined, at all points for the same year; and this percentage shall also apply (and then will take the place of the percentages set out in (a) above and in (c) below) in the event International shall ever merge, combine or consolidate solely with the Gulf Coast Lines into one corporation;

and (except as may be otherwise provided herein) which shall be not less than:

(c) 5.1% of the total of the average number of Office and Shop Employees employed by International and Missouri Pacific, combined, at all points for the same year; and this percentage shall also apply (and then will take the place of those set out in (a) and (b) above) in the event International shall ever merge, combine, or consolidate solely with Missouri Pacific into one corporation;

and (except as may be otherwise provided herein) which shall be not less than:

(d) 4.5% of the total of the average number of Office and Shop Employees employed by International and all of the remaining Missouri Pacific Lines, combined, at all points for the same year; and this percentage shall also apply (and then will take the place of the percentages set out in (b) and (c) above in the event that Gulf Coast Lines and Missouri Pacific shall merge, combine, or consolidate into one corporation; and this percentage shall also apply (and then exclusively, and in place of the percentages set out in (a), (b) and (c) above), in the event International, Gulf Coast Lines, and Missouri Pacific shall ever merge, combine, or consolidate with each other into one corporation;

and the reference to each railroad in (a), (b), (c) and (d) above shall include its successors and assigns to the extent of the operation of the railroad referred to. The provisions of this part 2.A. and part 2.C. of this Section II are subject to the following express conditions, viz.: (1) If International as reorganized shall emerge from the Reorganization Proceedings as a separate corporation which is not a subsidiary of, and does not have as a subsidiary, any of the other Missouri Pacific Lines (including any successor or successors thereof), and which is in fact independent of any ownership or control (whether by reason of a common ownership of stock or otherwise) by, and does not itself own or control any of the other Missouri Pacific Lines (including the successor or successors thereof) or any subsidiary thereof, then subparagraphs (b), (c) and (d) above shall have no application so long (and only so long) as International shall

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operate as such an independent railroad; (2) If International as reorganized shall emerge from the Reorganization Proceedings merged with Gulf Coast Lines into one

corporation which is not a subsidiary of, and does not have as a subsidiary, any of the other Missouri Pacific Lines (including the successor or successors thereof) and which is in fact independent of any ownership or control (whether by reason of a common ownership of stock or otherwise) by, and does not itself own or control, any of the other Missouri Pacific Lines (including the successor or successors thereof) or any subsidiary thereof, then (as provided in subparagraph (b) above) subparagraphs (a) and (c) above shall no longer apply, and, it is further agreed, neither shall subparagraph (d) above have any application so long (and only so long) as merger of International and Gulf Coast Lines shall operate as such an independent railroad; (3) If International as reorganized shall emerge from the Reorganization Proceedings merged with Missouri Pacific into one corporation which is not a subsidiary of, and does not have as a subsidiary, any of the other Missouri Pacific Lines (including the successor or successors thereof) and which is in fact independent of any ownership or control (whether by reason of a common ownership of stock or otherwise) by, and does not itself own or control any of the other Missouri Pacific Lines (including the successor or successors thereof) or any subsidiary thereof, then (as provided in subparagraph (c) above) subparagraphs (a) and (b) above shall no longer apply, and it is further agreed, neither shall subparagraph (d) above have any application so long (and only so long) as such merger of International and Missouri Pacific shall operate as such an independent railroad; and (4) Subject to the three (3) preceding conditions, if any of the Missouri Pacific Lines (including the successor or successors thereof except a successor constituting a merger with International) other than International or its successor shall emerge from the Reorganization Proceedings as a separate corporation which is not a subsidiary of, and does not

have as a subsidiary, any of the other Missouri Pacific Lines (including the successor or successors thereof) and which is in fact independent of any ownership or control (whether by reason of a common ownership of stock or otherwise) by, and does not itself own or control any of the other Missouri Pacific Railroad Lines (including the successor or successors thereof) or any subsidiary thereof, then the Office and Shop Employees of such railroad shall be excluded from any calculation of percentages provided for in this part 2.A. and in part 2.C. of this Section II of this Judgment so long (and only so long) as such railroad shall operate as such an independent railroad. Subject to the foregoing it is further provided that in the event that: (i) International (or its successor) or any of the other Missouri Pacific Lines (including the successor or successors thereof) shall ever merge, combine or consolidate with any of the other Missouri Pacific Lines or with any other railroad or railroads; and (ii) if subsections (b), (c) and (d) above, or any of them, do not expressly apply thereto, then the percentages set out in (a), (b), (c) and (d) above, or the one or more of them which would be affected thereby, shall be recalculated and redetermined by multiplying each percentage so affected by a fraction, the numerator of which is the average annual number of Office and Shop Employees employed by the railroad or railroads in question (i.e., other than the railroad or railroads with which the merger, combination, or consolidation is made) during the five (5) years immediately preceding the year in which

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the merger, combination, or consolidation occurs, and the denominator of which is a sum equal to the numerator plus the average annual number of Office and Shop Employees employed by the railroad or railroads with which the merger, combination, or consolidation is made during the same

five (5) year period; and thereafter beginning the effective date of such merger, combination, or consolidation, the percentage or percentages obtained as the product or products of such multiplication shall be applied (in so far as the merged, combined, or consolidated railroad is concerned) until a new or different merger, combination, or consolidation is made, in which event there shall be another recalculation and redetermination under the provisions hereof.

2. B. It is further ORDERED that the total payroll of Office and Shop Employees maintained by the RAILROAD at Palestine for any calendar year shall never be less than the product of the minimum number of Office and Shop Employees required to be employed by the RAILROAD at Palestine for that year under the applicable provisions of parts 2.A. or 2.C. of this Judgment (next above or next below) multiplied by the average per capita compensation of all of the Office and Shop Employees used under parts 2.A. or 2.C., as the case may be, in determining the minimum number of Office and Shop Employees required to be employed at Palestine for the year.

2. C. The RAILROAD shall maintain at Palestine, Texas, the number and payroll of Office and Shop Employees required by parts 2.A. and 2.B. of this Section II of this Judgment, unless for any year the RAILROAD shall be excused from such compliance by other provisions of this Judgment. In this connection the RAILROAD has represented to the Court that it is impractical for the RAILROAD to begin compliance with the percentage provisions of part 2.A. immediately upon the effective date of this Judgment, and it is therefore provided that for the first twelve (12) calendar months after such effective date, the RAILROAD'S employment percentage obligations shall be as follows: Beginning the first day of the seventh

(7th) calendar month after this Judgment is entered and continuing for six (6) calendar months thereafter, in place of the percentages set out in subparagraphs (a), (b), (c) and (d) of part 2.A. of this Section II of this Judgment, the following minimum percentages shall apply, viz.:

(a) — 38.4%
(b) — 20.0%
(c) — 4.9%
(d) — 4.4%

Upon compliance with such percentages for the last six (6) months of the first twelve (12) months from and after the entry of this Judgment, it shall be conclusively deemed that the obligations of the RAILROAD hereunder for all of said first twelve (12) months period are being performed to the full extent required by the provisions of this Judgment if the applicable of such percentage requirements (substituted for those set out in (a), (b), (c) and (d) of part 2.A. of this Section II) are met. Compliance with the above shall relieve the RAILROAD of the obligation of complying with the percentages set forth in part 2.A. of this Section II during, and only during, the first twelve (12) months following the entry of this Judgment.

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2. D. The actual number of Office and Shop Employees at Palestine for any year shall be calculated by adding together the twelve (12) sums representing the actual number of such Employees on the payroll for each month of the year, and dividing the result by twelve (12). Each annual average total number of Office and Shop Employees for each railroad shall be determined by the average of twelve (12) monthly employee counts which shall be made by the RAILROAD once during each month of each calendar year, each such count to be of the total number of Office and Shop Employees in service as of a day reason-

ably near the middle of the month, in accordance with regulations of the Interstate Commerce Commission. Within a reasonable time after each monthly employee count is made of the Office and Shop Employees of each railroad affected by the provisions of parts 2.A. and 2.C. of this Section II of this Judgment, full particulars thereof shall be obtained and furnished Palestine and Anderson County by the RAILROAD. Likewise, within a reasonable time after the end of each calendar year (and in any event prior to the following July 1st), the RAILROAD shall furnish Palestine and Anderson County all information necessary for the City and County to determine whether there has been compliance by the RAILROAD with the provisions of part 2.B. of this Section II hereof during the preceding calendar year. Representatives of the City and County shall have the right at all reasonable times during business hours, after first giving the RAILROAD reasonable notice in advance thereof, to audit, inspect and copy records of the RAILROAD relating to the subject matter of this Judgment.

3. So long as the RAILROAD shall in good faith comply with the provisions of this Judgment, it shall not be necessary that the RAILROAD keep and maintain at Palestine, Texas, any one or more of the following officials of International or of any successor of International: President, Vice-President and General Manager, Secretary, Treasurer, Auditor, General Freight Agent, Traffic Manager, General Superintendent, General Passenger and Ticket Agent, Chief Engineer, Master of Transportation, Fuel Agent, General Claim Agent, Superintendent of Motive Power and Machinery, and Master Mechanic; nor any of its general offices, machine shops and roundhouses.

4. The RAILROAD shall promptly notify the City and County, and the City and County shall promptly notify the

RAILROAD, of any proceeding to which any of them or their successors may be a party or may have knowledge, hereafter filed or to be filed with the Railroad Commission of Texas or with the Interstate Commerce Commission or with other governmental authority, State or Federal, having jurisdiction in railroad matters, or in any Court, concerning or which might in any substantial way affect the rights of the RAILROAD or of the City and County and their citizens under this Judgment and the Agreement on which the same is based; and in the event any such proceeding shall be filed, the RAILROAD and the City and County shall cooperate with each other in enforcing the provisions of this Judgment and the aforesaid new Agreement dated December 21, 1954, without diminution of any party's rights hereunder or thereunder.

5. No waiver by the City and County, or either of them, of all or any part of this Judgment, and no status allowed to exist or course of action allowed to continue, either with or without knowledge of officials of the City and County, and no delay on

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the part of the City and County, or either of them, in exercising any rights available to such parties hereunder shall operate as a waiver of any right of the City and County to insist on full compliance with this Judgment, or in any way prejudice the City and County in enforcing the terms and provisions hereof.

6. In the event the RAILROAD shall be rendered unable wholly or in part by *force majeure* to carry out its obligations under this Judgment, it is specifically provided that upon its giving notice and full particulars of such *force majeure* in writing to the City and County as soon as possible after the occurrence of the cause relied on, then the obligations of the RAILROAD so far as they are affected by such *force majeure*, shall be suspended during

the continuance of any inability so caused but for no longer period, and such cause shall as far as possible be remedied with all reasonable dispatch. The term *force majeure* as employed herein shall include acts of God, strikes, lockouts, or other industrial disturbances, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests and restraints of governments and people, civil disturbances, and any other causes of a similar nature not within the control of the RAILROAD and which by the exercise of due diligence it is unable to prevent or overcome. It is specifically provided that the settlement of strikes, lockouts, or other industrial disturbances shall be entirely within the discretion of the RAILROAD, and the above requirement that any *force majeure* shall be remedied with reasonable dispatch shall not require the RAILROAD to settle strikes, lockouts, or labor disputes by acceding to the demands of an opposing party or parties when such course is inadvisable in the discretion of the RAILROAD.

7. If the RAILROAD shall for any reason not excused by some provision of this Judgment fail to perform in accordance with the terms of this Judgment in good faith to the full extent herein required, the City and County may:

(a) Require the specific performance by the RAILROAD of its obligations hereunder; or,

(b) Notify the RAILROAD in writing of the intention of the City and County to rescind the aforesaid new Agreement on which this Judgment is based unless the RAILROAD shall, within a reasonable time after receipt of such notice, cure any defaults specifically brought to its attention in said written notice in a manner reasonably satisfactory to the City and County; and upon the RAILROAD'S failure to do so within such period, the City and County may apply to this court or any other court of competent jurisdiction for a hearing to determine whether any of said defaults exist as claimed and constitute a breach of this

Judgment and the aforesaid new Agreement on which the same is based not excused by some provision hereof or thereof, and if the Court shall find that the RAILROAD has defaulted as claimed and that such defaults, or any of them, do constitute an unexcused breach of this Judgment and the aforesaid new Agreement on which the same is based, the City and County shall be entitled to rescind the aforesaid new Agreement on which this Judgment is based and shall be

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entitled to have the Court enter an Order reinstating the 1914 Judgment unaffected by the provisions of this Judgment or such new Agreement on which same is based; and upon the entry of such an Order such 1914 Judgment shall again be in full force and effect and may be enforced against the RAILROAD (or its successors and assigns), and the parties hereto shall thereupon be restored to their original positions and respective rights and obligations as they existed immediately prior to the execution by the parties of the aforesaid new Agreement on which this Judgment is based; and neither the elapsing period of time nor anything that occurred under and pursuant to this Judgment or the aforesaid new Agreement on which the same is based shall in anywise prejudice the rights of any party hereto. If for any reason the City and County shall not apply to the Court for such a determination and Order of the Court reinstating the 1914 Judgment, or if, after such an application is filed, the Court shall for any reason decline to enter such an Order as requested by the City and County, this Judgment and the aforesaid new Agreement on which same is based shall continue in full force and effect as though no such notice of intention to rescind such Agreement had been given the RAILROAD by the City and County;

(c) Either concurrently, independently, or cumulative of the foregoing, exercise or enforce any other right or remedy which may be available to the City and County and their citizens under the then existing cir-

cumstances; but in no event shall the RAILROAD, its successor or successors, be subjected to any suit for any money damages or penalties or forfeitures, if any, arising or claimed to have arisen by reason of any alleged non-compliance with the 1914 Judgment on the part of the RAILROAD occurring prior to the entry of this Judgment, or occurring after the entry of this Judgment but prior to reinstatement of the 1914 Judgment as provided in paragraph (b) last above.

III.

This Judgment and the aforesaid new Agreement dated December 21, 1954, on which the same is based shall have the same status under the Federal Bankruptcy Act as the 1914 Judgment and the agreement mentioned therein. Nothing contained in this Judgment or in such new Agreement on which same is based shall in any way diminish the rights of Palestine and Anderson County or of the RAILROAD under Section 77(n) or other provisions of such Federal Bankruptcy Act except as may be expressly provided herein or in such new Agreement.

IV.

1. The defendants, International-Great Northern Railroad Company and its Trustee, Guy A. Thompson, shall, within a reasonable time after the entry of this Judgment: (a) recondition, remodel or replace such shop buildings at Palestine as may be

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necessary to provide proper and adequate shop facilities for the personnel of such RAILROAD employed and to be employed at Palestine, Texas, under the terms of this Judgment and the Agreement on which same is based; (b) install additional freight car repair facilities; and (c) provide such other facilities and equipment as may be necessary for

the mechanical and other work to be performed at the Palestine shops. Such RAILROAD shall have the right to dismantle and remove any shop buildings and other facilities which are now or later become obsolete and no longer required for such work.

2. Defendant Guy A. Thompson, Trustee, having obtained authority from the Reorganization Court to expend approximately $200,000.00 in the construction of a modern office building at Palestine, Texas, on land owned by International at Palestine, Texas, shall proceed to construct such a building and shall complete the same with due diligence.

V.

If the City and County shall elect to file an application with the Interstate Commerce Commission to obtain an approval by such Commission of this Judgment (and the Agreement on which the same is based), the City and County shall so notify the RAILROAD in writing and upon receipt of any such notice, the RAILROAD shall join with the City and County in presenting and seeking approval of such application and the RAILROAD shall cooperate with the City and County in all reasonable and proper ways with respect thereto.

VI.

All notices required to be given under any of the provisions of this Judgment shall be in writing and shall be conclusively presumed to have been communicated to the party to whom such notice is to be given when the party giving such notice deposits a properly stamped envelope containing such notice in the United States mail, first class, addressed as follows:

The Mayor
City of Palestine
Palestine, Texas

The County Judge
Anderson County
Palestine, Texas

Guy A. Thompson, Trustee
International-Great Northern Railroad Company
Missouri Pacific Building
13th at Olive Streets
St. Louis, Missouri

provided that the address of any party hereto may be changed by such party giving each of the other parties, notice of such change of address.

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VII.

In the event of any conflict between any of the terms and provisions of the new Agreement (by and between the parties filing the Motion for New Judgment), dated December 21, 1954, and the terms and provisions of this Judgment, the terms and provisions of this Judgment shall control.

VIII.

The terms of this Judgment shall extend to the successors and assigns of the parties to this Cause. Until final termination of the Reorganization Proceedings, the Trustee shall perform all obligations of the RAILROAD and of the Trustee hereunder pursuant to orders of the aforesaid Reorganization Court, and thereafter, the RAILROAD or its successor or successors, shall perform such obligations; and this Judgment shall extend to and be binding upon the Reorganization Managers appointed pursuant to any final Plan of Reorganization of International, and shall be binding upon each person, corporation, or other entity which

succeeds to the interest, properties, and position of International-Great Northern Railroad Company.

IX.

Any relief prayed for by any of the parties and Interveners which is not expressly granted by this Judgment is hereby denied.

X.

All costs of Court in connection with the Motions to Strike the Intervention of Opposing Interveners and in connection with the Motion for New Judgment and this Judgment are taxed jointly and severally against the City of Palestine, et al. Parties and the Railroad Parties, to which action of the Court the Railroad Parties duly excepted. All other costs are taxed against Opposing Interveners, to which action of the Court Opposing Interveners duly excepted. Opposing Interveners also duly excepted to the foregoing judgment in its entirety and each portion thereof granting the Motion for New Judgment and overruling Opposing Interveners' objections thereto.

ENTERED this 2nd day of March, 1955.

(Signed) H. T. Brown
Judge of the District Court
of Cherokee County, Texas

Supreme Court, U. S.
FILED
MAR 16 1978
MICHAEL RODAK, JR., CLERK

No. 77-870

In the Supreme Court of the United States

OCTOBER TERM, 1977

MISSOURI PACIFIC RAILROAD COMPANY, PETITIONER

v.

CITY OF PALESTINE, TEXAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

MARK L. EVANS,
General Counsel,
Interstate Commerce Commission,
Washington, D.C. 20423.

In the Supreme Court of the United States

OCTOBER TERM, 1977

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v.

CITY OF PALESTINE, TEXAS, ET AL.

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MEMORANDUM FOR THE FEDERAL RESPONDENTS

This case involves the validity of an order of the Interstate Commerçe Commission. The order, issued under Section 5 of the Interstate Commerce Act, 24 Stat. 380, as amended, 49 U.S.C. 5, approved a rail merger proposal and nullified certain state laws and contractual restraints that would have unduly burdened the unified rail operation.

1. In 1974 petitioner and its principal subsidiaries—Texas and Pacific Railway Co. (T&P) and Chicago & Eastern Illinois Railroad Co. (C&EI)—filed a joint application under Section 5(2) of the Act to merge the properties and franchises of T&P and C&EI into petitioner. Petitioner, T&P, and C&EI already operated a united system; the proposed merger was "merely a

'corporate simplification' designed to bring two near-wholly owned subsidiaries under the banner of the parent company" (Pet. App. 13).

In connection with their application, the railroads asked that petitioner be relieved of its obligations under the "Palestine Agreement." Its early history is recounted in *International & Great Northern Ry.* v. *Anderson County*, 246 U.S. 424. The International and Great Northern Ry. was required, under a contract reinforced by a state law, to keep its headquarters in Palestine, Texas (Pet. App. 34-39). After petitioner acquired the Great Northern, petitioner became insolvent. Petitioner explored the possibility of rearranging its corporate structure as part of its reorganization effort, so that it would emerge from reorganization as a unified company. The reorganization court, however, was powerless to nullify Great Northern's obligation, by then embodied in a judicial decree, to maintain its corporate headquarters in Palestine (Pet. App. 8-9). The courts suggested that petitioner seek a modification of the judicial decree.

In 1954 petitioner entered into negotiations with the City of Palestine to obtain a modification of the decree. The parties later executed the Palestine Agreement. The Agreement ended the Great Northern's obligation to maintain its general headquarters in Palestine; petitioner agreed, in exchange, to maintain 4.5 percent of its employees in certain job classifications in Palestine (Pet. App. 9, 40-41). The judicial decree was modified in accordance with the agreement, and petitioner and Great Northern were consolidated.

The present case arises out of petitioner's effort to eliminate its obligations under the Palestine Agreement. The City of Palestine and Anderson County objected to petitioner's request that the Commission abrogate the Palestine Agreement under Sections 5(2) and 5(11) (now

5(12)) of the Act as part of the Commission's approval of the merger of T&P and C&EI into petitioner.[1]

The Commission found that the Palestine Agreement imposes "undue burdens and obligations on [petitioner] and * * * will impose unduly burdensome, inefficient, [in]juriously wasteful, and unnecessary obligations on the proposed unified operations and upon interstate commerce" (Pet. App. 31). It concluded that "the Commission has the authority under section 5(11) of the act to relieve [petitioner] of these requirements, and that [petitioner] should be relieved of its obligations thereunder" (*ibid.*).

The court of appeals affirmed the Commission's order except insofar as the order relieved petitioner of its obligations under the Palestine Agreement (559 F. 2d 408; Pet. App. 4-24). The court agreed with the Commission that the Palestine Agreement would unduly burden petitioner's unified system and interstate commerce (Pet. App. 14-15). It held, however, that this is not sufficient to trigger the Commission's power under Section 5(2) and (11) to set aside petitioner's obligations (*id.* at 12):

> [W]e conclude that the ICC's power only extends to setting aside state restraints to the effectuation of an approved section 5(2) transaction and no further. Although the Palestine Agreement may burden [petitioner], the agreement clearly is not an obstacle

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[1] Section 5(2) provides that it shall be lawful, with the Commission's approval, "for two or more carriers to consolidate or merge their properties or franchises * * * into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership * * *." Section 5(12) provides that carriers participating in a transaction approved under Section 5 "are relieved from the operation of * * * all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved * * *."

> to the merger of T&P and C&EI and does not threaten the merger's success. The ICC exceeds the scope of its authority when it voids contracts that are not germane to the success of the approved section 5(2) transaction.

Although the Commission had found the annulment of the Palestine Agreement to be related to the central objectives of the proposed merger—*i.e.*, to streamline rail operations and to enhance operational flexibility—the court disagreed. It stated (*id.* at 13): "Despite the irrelevance of the Palestine Agreement to the merger, the ICC has gratuitously relieved [petitioner] of its contractual obligations."

2. Petitioner asserts (Pet. 13) that, under the court of appeals' holding, "the Commission is limited by §5(11) and may nullify state law restraints only where the restraints would stand in the way of or absolutely prohibit a proposed consolidation." If that is the correct characterization of the court's holding, then it would be contrary to *Texas* v. *United States*, 292 U.S. 522; *Seaboard Air Line R.R.* v. *Daniel*, 333 U.S. 118; and *Schwabacher* v. *United States*, 334 U.S. 182, and would significantly frustrate the congressional policy of encouraging rail consolidations in the public interest.[3] But we do not read the court's decision so broadly. Although

[3] Cf. *First Lincolnwood Corp.* v. *Board of Governors*, 560 F. 2d 258 (C.A. 7) (*en banc*), which held that the Federal Reserve System may not disapprove the formation of a new bank holding company, even if its financial structure would be unsound, unless the reorganization would make financial conditions deteriorate. This Court has granted the Board's petition for certiorari (No. 77-832, granted February 21, 1978), which argued that the Board need not find that a particular condition will be aggravated by the change of corporate structure before it may order that condition corrected.

the opinion includes language that may lend support to petitioner's reading of the decision, the language is dicta at best. We believe that the decision stands only for the principle that the Commission may not nullify state law restraints that are not materially related to a proposed merger or consolidation within the Commission's jurisdiction. The court set aside the Commission's decision here only because it thought that the Palestine Agreement is irrelevant to the merger (Pet. App. 13).

We agree with petitioner that the court of appeals erred in finding, contrary to the Commission's determination, that the Palestine Agreement is unrelated to petitioner's corporate simplification merger. The Commission found that the Palestine Agreement's requirements will preclude petitioner from taking full advantage of the opportunities for savings made possible by the merger, and the Agreement thus frustrates the transaction that the Commission properly approved. The court of appeals should not have substituted its own judgment on this question for that of the Commission. See, *e.g.*, *Ralston Purina Co.* v. *Louisville & Nashville R.R.*, 426 U.S. 476. But because, in our view, the court of appeals' decision rests more on factual disagreement with the Commission than on any legal disagreement, the United States and the Commission did not file a petition for a writ of certiorari. Moreover, in the Commission's view, circumstances like those presented by this case are not likely to recur, because the Commission rarely exercises its nullification authority under Section 5(11) to upset agreements similar to this one.

Because the court of appeals erroneously set aside the Commission's factual determination, however, we will support the Commission's order if the petition is granted.

Respectfully submitted.

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MARCH 1978.

DOJ 1978-03

Supreme Court, U. S.
FILED
MAR 23 1978
MICHAEL RODAK, JR., CLERK

No. 77-870

In the

Supreme Court of the United States

OCTOBER TERM, 1977

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,

vs.

CITY OF PALESTINE, TEXAS, ANDERSON COUNTY, TEXAS, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit

PETITIONER'S REPLY MEMORANDUM

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March 21, 1978

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The brief in opposition essentially acknowledges that that holding of the court below was erroneous by seeking to uphold the judgment below solely on grounds not reached by the court of appeals. The court of appeals held that the Interstate Commerce Commission was powerless in a railroad consolidation proceeding under Section 5 of the Interstate Commerce Act (49 U.S.C. §5) to nullify restraints arising from state law even when those restraints frustrate the economies and efficiencies to be realized from the consolidation, impose an undue bur-

den on interstate commerce, and are contrary to the public interest. The court interpreted Section 5(11) as limiting the Commission's nullification powers to those instances where the restraints would prevent the effectuation of the technical merger, where state law restraints "[stand] in the way of the approved transaction." (App. 14).[1] Thus, the court below failed to recognize that Section 5(11) is merely a description of the scope of the immunity conferred by law as a result of a Commission order and that the only limitations on the Commission's nullification power are found in Section 5(2)(b), which requires that the terms and conditions imposed by the Commission be "just and reasonable" and that the merger as approved "will be consistent with the public interest." (App. 2).

MoPac demonstrated in its Petition that the court of appeals' reading of Section 5 is wholly inconsistent with decisions of this Court, other courts of appeals, and the Commission, and that the interpretation of the Commission's powers reached by the court below, if allowed to stand, would severely frustrate the oft-expressed Congressional intent to foster the development of efficient and economical rail systems through consolidations and mergers. The limitation imposed on the Commission by the court below cannot stand in view of this Court's interpretation of the Commission's authority expressed in *Texas* v. *United States*, 292 U.S. 522 (1934); *Seaboard Air Line R.R. Co.* v. *Daniel*, 333 U.S. 118 (1948); and *Schwabacher* v. *United States*, 334 U.S. 182 (1948).[2]

[1] "App." refers to the Appendix to the Petition for Writ of Certiorari filed by the Missouri Pacific Railroad Company (MoPac).

[2] Respondents rely heavily on the dissenting opinion in *Schwabacher*. (Brief in Opposition, pp. 19-20).

The Brief in Opposition filed by Respondents City of Palestine, Texas, and Anderson County, Texas, does not attempt to defend the sole ground upon which the court below rested its decision.[3] In what amounts to a confession of error, Respondents seek to uphold the result reached below on contentions the resolution of which the court below explicitly stated were "unnecessary for our decision" (App. 11), and which the opinion below did "not resolve" (App. 12). By relying on arguments not reached below, Respondents essentially acknowledge that the decision below cannot be defended as a proper interpretation of the Interstate Commerce Act.

Instead, Respondents argue first that the Palestine Agreement is a purely private contract with a third party not involved in the proposed consolidation and that the Commission does not have the power to nullify restraints of this nature. Respondents made the same contentions in the court below, where they were hotly contested by Petitioner.[4] In view of its holding, which Respondents do

[3] Respondents note the actual holding below only in passing (Brief in Opposition, p. 18), but make no effort to defend it in light of the Petition.

[4] 'Respondents' attempt to characterize the agreement as purely private ignores the fact, noted by the court below (App. 7-8), that the agreement bound the predecessor to MoPac only as a result of Texas statutes, the nullification of which was approved by this Court in *Texas* v. *United States*, 292 U.S. 522 (1934). Although the provisions of the agreement have been modified over the years as a result of negotiations between the parties, there can be no doubt that the underlying requirement to retain employees and facilities in Palestine stems from the Texas statutes. See the Appendix to the Commission decision. (App. 38).

(Footnote continued)

not attempt to defend in this Court, the court below did not resolve these issues:

> "We need not resolve either of these questions because, assuming for the purpose of argument that the ICC has the power to abrogate this contract, we conclude that the ICC's power only extends to setting aside state restraints to the effectuation of an approved section 5(2) transaction and no further. Although the Palestine Agreement may burden MoPac, the agreement clearly is not an obstacle to the merger of T&P and C&EI and does not threaten the merger's success." (App. 12).

The court below thus assumed that "state restraints" were involved and held that the ICC's power was limited to setting aside only those restraints that were "not an obstacle to the merger" transaction as such. The failure of Respondents to support the only holding made by the court below, the clear error in the interpretation of the Commission's authority upon which the Court below rested its decision, and the significance of the decision in

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[4] (Continued)

Moreover, the power of the Commission to abrogate private contracts when necessary in the public interest has been established by this Court in *Louisville & Nashville R. R. Co.* v. *Mottley*, 219 U.S. 467, 482 (1911), and *New York* v. *United States*, 257 U.S. 591, 600-601 (1922). Indeed, in *Texas and New Orleans R. Co.* v. *Brotherhood of Railroad Trainmen*, 307 F.2d 151, 161 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963), cited by Respondents (Brief in Opposition, p. 34), the Fifth Circuit acknowledged that:

> "Under certain circumstances, when carriers have been faced with contract demands which would be contrary to the public interest in the effectuation of a Section 5(2) transaction, the courts have held that the carrier may be relieved of those demands by the Commission."

view of recent and continued Congressional enactments designed to encourage rail economy and efficiency through consolidation, all establish the need for review by this Court. The judgment below, based exclusively on an erroneous interpretation of the Interstate Commerce Act, should be vacated and the cause remanded to the court of appeals for that court to address, in the first instance, the question not reached, namely whether the Palestine Agreement is a "restraint, limitation, [or] prohibition of law," within the meaning of Section 5(11). *See United States* v. *Chesapeake & Ohio Ry. Co.*, 426 U.S. 500, 515 (1976); *Central Hardware Co.* v. *National Labor Relations Board*, 407 U.S. 539, 548 (1972); *Federal Power Commission* v. *United Gas Pipe Line Co.*, 386 U.S. 237, 247 (1967); *United States* v. *Great Northern Ry. Co.*, 343 U.S. 562, 578 (1952).

Respondents' second attempt to sustain the decision of the court below is to argue that the nullification of the Palestine Agreement was not in the public interest and that the Commission's decision should have been set aside on this basis as well. Thus, Respondents cite MoPac's earnings,[5] the adverse impact on MoPac employees located

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[5] The earnings and dividend figures quoted by Respondents are meaningless, of course, without knowing what rate of return on investment they represent. For 1976, MoPac's earnings represented a rate of return on capital invested in the railroad of only 4.93%. At a time when yields on U.S. Government bonds exceed 8%, Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act) with the purpose of improving railroad earnings in order to preserve the railroads as private enterprises able to attract investment capital without government subsidies. (4-R Act, §§101(a), 205, 45 U.S.C. §801(a), 49 U.S.C. §15a(4)).

at Palestine,[6] and the effects of the removal of a number of these employees on the Palestine economy.

Each of these concerns was thoroughly presented at the hearing before the administrative law judge and was considered by him and the full Commission. Notwithstanding these matters, the Commission, with only a single dissent, found that the restraining effect of the Palestine Agreement on the realization of the economies and efficiencies of the merger and the burden on the unified operations and interstate commerce was so substantial that the nullification of the agreement was required in the public interest. Indeed, the court below acknowledged that the agreement constituted a restriction on the efficient operation of the consolidated system:

> "No doubt the merged MoPac system would operate more efficiently and free of 'burdens on interstate commerce' without the strictures of the Palestine Agreement." (App. 14).

In their public interest contention as well Respondents are seeking to support the result reached below on a ground not relied upon by the court of appeals because of its erroneous interpretation of the Commission's statutory authority. As explained above, Petitioner submits that the appropriate procedure is to grant review, vacate the judgment below as resting on a clearly erroneous interpretation of the Interstate Commerce Act, and remand the case to the court of appeals for consideration of the questions upon which Respondents rely in this Court but which were not resolved by the Court below.

[6] As Respondents' recognize in their Brief in Opposition, p. 32, the interests of affected employees are sufficiently protected by Section 5(2) (f) of the Act, which requires a carrier to ensure that its employees will not be placed in a worse position as a result of a merger.

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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March 21, 1978